DELAWARE FREEDOM OF INFORMATION ACT

POLICY MANUAL©

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Introduction

Twenty years ago, the Delaware General Assembly enacted the Freedom of Information Act ("FOIA"), 29 Del. C. Sections 10001-10005, effective January 1, 1977.[1] Since then, FOIA has been the subject of 30 Delaware court decisions and over 80 opinions by the Attorney General's Office.

The purpose of this Policy Manual is two-fold: first, to provide a desk-top reference manual so as not to duplicate previous research; and second, to provide state agencies and the public at large with an up-to-date guide to the interpretation and application of FOIA.

The Policy Manual is an extended commentary on Chapter 100 of Title 29 of the Delaware Code. It begins with Section 10001, "Declaration of Policy," and then addresses the two major components of FOIA: access to public records, and open meetings. Finally, the Policy Manual examines complaint and enforcement procedures under Section 10005.

The annotations cite to every Delaware court decision involving FOIA (reported or on WESTLAW), as well as most Attorney General opinions on FOIA issued since 1977. In addition, there are citations to federal case law, and decisions by other state courts, where helpful in interpreting the Delaware FOIA by analogy.

The Policy Manual is not intended to answer all FOIA questions that may arise. Novel or complex FOIA questions should be referred to the Government Services Group, which drafts Attorney General opinion letters regarding FOIA, and responds to complaints alleging violations of FOIA under Section 10005. All Attorney General opinions regarding FOIA are accessible through WESTLAW and LEXIS

[1] FOIA repealed and superseded an earlier open meeting statute, 29 Del. C. Section 5109. See 60 Del. Laws, Chapter 641.

and will soon be available on the Internet at the Delaware Attorney General's Office homepage which is located at the following web site: http://www.state.de.us/govern/elecoffl/attgen/agoffice.htm. It is also expected that this Policy Manual will be available on that same homepage.

A Table of Authorities appears at the end of the Policy Manual, with page references for easy locating. This Manual will be updated for deputies in the Civil Division with an annual pocket part.

SECTION 10001. DECLARATION OF POLICY

The public policies behind FOIA are clear:

> **It is vital in a democratic society that public business be performed in an open and public manner so that our citizens shall have the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy; and further, it is vital that citizens have easy access to public records in order that the society remain free and democratic. Toward these ends, and to further the accountability of government to the citizens of this State, this chapter is adopted and construed.**

29 Del. C. Section 10001.

The Delaware Supreme Court has emphasized the strong public policies underlying FOIA: to "ensure governmental accountability, inform the electorate, and acknowledge that public entities, as instruments of government, should not have the power to decide what is good for the public to know." Delaware Solid Waste Authority v. The News-Journal Co., Del. Supr., 480 A.2d 628, 631 (1984) ("Solid Waste Authority"). "Consistent with these salutary purposes," FOIA is "liberally construed" and any statutory exceptions "are strictly interpreted." Id. See also The News-Journal Co. v. McLaughlin, Del. Ch., 377 A.2d 358, 362 (1977) (Brown, V.C.) ("McLaughlin") (FOIA "is to be liberally construed in favor of the citizens of the State").

Since its original enactment, the General Assembly has amended FOIA twelve times, both expanding and narrowing the scope of the statute. With regard to public records, the legislative changes show an increased concern for personal privacy, with four new exemptions added to the original ten. In addition, the General Assembly has enacted or amended other statutes to exclude a variety of public

records from the coverage of FOIA, again mostly out of concern for personal privacy.

A major legislative overhaul occurred in 1985. See 65 Del. Laws c. 191. One of the most important changes was the application of the public meeting law. In Solid Waste Authority, the Supreme Court held that the open meeting law did not apply to the Authority's standing committees, because they consisted of less than a quorum of the directors. The Court reached this conclusion "with reluctance and concern that it may be misconstrued as a license for abuse." 480 A.2d at 633. But "[i]f the policy or wisdom of a particular law is questioned as unreasonable or unjust, then only the elected representatives of the people may amend or repeal it." Id.

In response, the General Assembly expanded the definition of a "public body" to include any "ad hoc committee, special committee, temporary committee, advisory board and committee, subcommittee, legislative committee, association, group, panel, council, or any other entity or body established by an Act of the General Assembly of the State, or established by any body established by the General Assembly of the State, or appointed by any body or public official of the State, or otherwise empowered by any State governmental entity, ..." 65 Del. Laws. c. 191, s. 2.

There have been many proposed legislative changes to FOIA to narrow the scope of the law. But until such time as the General Assembly amends the statute, its current terms must be broadly construed. With regard to open meetings, the Chancery Court has put government officials on notice that they should "follow a very simple, practical principle. When in doubt, the members of any public body should follow the open meeting policy of the law, and hold the discussion in public." Levy v. Board of Education of Cape Henlopen School District, Del. Ch., 1990 WL 154147, at p. 9 (Oct. 1, 1990) (Chandler, V.C.) ("Levy").

SECTION 10002. DEFINITIONS

(a) "Public body" means, unless specifically excluded, any regulatory, administrative, advisory, executive, appointive or legislative body of the State, or of any political subdivision of the State, including, but not limited to, any board, bureau, commission, department, agency, committee, ad hoc committee, special committee, temporary committee, advisory board and committee, subcommittee, legislative committee, association, group, panel, council or any other entity or body established by an act of the General Assembly of the State, or established by any body established by the General Assembly of the State, or appointed by any body or public official of the State or otherwise empowered by any state governmental entity, which: (1) Is supported in whole or in part by any public funds; or (2) expends or disburses any public funds, including grants, gifts or other similar disbursals and distributions; or (3) is impliedly or specifically charged by any other public official, body, or agency to advise or to make reports, investigations or recommendations. Public body shall not include the General Assembly of the State, nor any caucus thereof, or committee, subcommittee, ad hoc committee, special committee or temporary committee.

In Opinion 77-10 (Feb. 16, 1977), this Office determined that the original definition of "public body" did not include a political caucus of members of the General Assembly. In reviewing the legislative history, this Office noted that Section 10002(a), as initially proposed, included "legislative party caucus" within the definition of "public body," but that in final form "legislative party caucus" was deleted. "It follows, therefore, that a political caucus may be closed to the public."

In a decision later that year, the Chancery Court held that a Democratic caucus comprising a quorum of the Wilmington City Council came within FOIA's definition of a "public body." In McLaughlin, Vice Chancellor Brown was unpersuaded by the argument that requiring open caucuses would impede "a majority political party from functioning as a unified group. As a practical matter, it obviously does. But apparently this is a burden which the General Assembly feels to be outweighed by the benefit that will flow to the citizenry by requiring those in control of public business to exercise it in an open manner. . . . [O]ne purpose of sunshine laws is to prevent at nonpublic meetings the crystallization of secret decisions to a point

just short of ceremonial acceptance, that rarely could there be any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors, and that a sunshine statute, being for the benefit of the public, should be construed so as to frustrate all such evasive devices." 377 A.2d at 362.

Based on McLaughlin, this Office determined that the General Assembly was a "public body" for purposes of the open meeting requirements of FOIA. Opinion 78-002 (Jan. 31, 1978).

In The News-Journal v. Boulden, Del. Ch., 1978 WL 22024 (May 24, 1978) (Brown, V.C.), the Chancery Court held that FOIA did not require political caucuses in the General Assembly to hold their meetings open to the public. Even if FOIA's definition of "public body" covered the 128th General Assembly which passed it, "I cannot accept the proposition that one General Assembly, by statute, can vest this Court with the authority to control the manner in which a subsequent General Assembly exercises the lawmaking power reposed solely in it by the Constitution." 1978 WL 22024, at p. 4.

To clear up any lingering confusion, the General Assembly amended the definition of "public body" in 1985 to exclude "the General Assembly of the State, [or] any caucus thereof, or committee, subcommittee, ad hoc committee, special committee, or temporary committee." 65 Del. Laws c. 191, s.2.

In Solid Waste Authority, the Delaware Supreme Court was called upon for the first time to construe the term "public body" in FOIA. The Court observed that the term "consists of two principal elements. First, the organization must fall into one or both of the broad categories of executive or legislative entities of the State or a political subdivision thereof. . . . The second definitional element of a public body is that the entity be supported in whole or part by public funds, expend or disburse such public funds, or be specifically charged by any other public body to advise or make recommendations." 480 A.2d at 632.

Public funds "are those ‹derived from the State.'" Id. (quoting 29 Del. C. Section 10002(c)).

By that definition, "the conclusion is inescapable that the Authority is a public body and subject to [FOIA]." 480 A.2d at 632. The General Assembly established the Authority to regulate and manage solid waste, and it received money from the State by way of initial appropriations to begin operations. The Solid Waste Authority argued that it did not receive public funds from the State, but only grants-in-aid, which FOIA originally excluded from the definition of "public funds." But the Supreme Court pointed out that the General Assembly amended the statute in 1983 to remove the grants-in-aid exclusion. See 64 Del. Laws c. 113. "Such legislative action indicates a continuing resolve to expand [FOIA's] coverage." 480 A.2d at 633.

This Office has determined that the courts are not "public bodies for purposes of FOIA." FOIA applies only to "executive and legislative agencies or entities established by an act of the General Assembly and supported by public funds" but not to the courts "since they were established by the Constitution." Opinion 94-IO11 (Mar. 7, 1994). See also Opinion 96-IB03 (Jan. 2, 1996) ("[t]he courts are not public bodies within the meaning of [FOIA]"). By extension, the public records provisions of FOIA do not apply to the database maintained by the Administrative Office of the Courts to assist the clerks of the Delaware courts, even if it is an agency created by act of the General Assembly. "The Administrative Office is supervised by the Chief Justice of the Delaware Supreme Court. Custody of court records resides with the clerks of the various courts. Since the courts and their records are not governed by FOIA, the mere fact that the Administrative Office maintains this database should not make the records subject to FOIA." Opinion 94-IO11.

Under a similar rationale, this Office determined that FOIA does not apply to the Board of Bar

Examiners, because it is an "arm" of the Delaware Supreme Court. Opinion 95-IBO1 (Jan. 18, 1995) (citing In re Reardon, Del. Supr., 378 A.2d 614 (1977)). Since the Supreme Court has exclusive jurisdiction to govern admission to the bar, subjecting the Board of Bar Examiners to FOIA "would be unconstitutionally intruding upon the judicial branch of the Government." Opinion 95-IB01.

This Office has also determined that the FOIA does not apply to the Court on the Judiciary. See Opinion 95-IB02 (Jan. 24, 1995). That determination was based on a court order issued November 16, 1994, which provides: "The functions of the Court on the Judiciary and its arms necessarily involve the deliberations of a court. Therefore, the provisions of 29 Del. C. ch. 100 (the ‹Freedom of Information Act') are not, by their terms, applicable to the matters referred to herein, and the Freedom of Information Act may not constitutionally be construed to be applicable thereto; . . ."

The courts and this Office have found that a wide variety of public entities are "public bodies" subject to FOIA. See, e.g., New Castle County Vocational-Technical Education Association v. Board of Education of New Castle County Vocational-Technical School District, Del. Ch., 1978 WL 4637, at p. 2 (Sept. 25, 1978) (Brown, V.C.) (school board "is unquestionably a public body"); The News-Journal Co. v. Billingsley, Del. Ch., 1980 WL 3043 (Nov. 20, 1980) (Hartnett, V.C.) (Delaware Association of Professional Engineers); Opinion 92-C011 (Apr. 13, 1992) (Council on Banking); Opinion 94-IO25 (Aug. 23, 1994) (Thoroughbred Racing Commission); Opinion 95-IB22 (July 31, 1995) (Governor's Council on Equal Employment Opportunity).[2]

[2]In addition to judicial construction of the term "public body", the General Assembly has made it clear in various enabling statutes that the entity created is subject to FOIA. See, e.g., 2 Del. C. § 1328 (Delaware Transportation Authority); 3 Del. C. § 707 (Agricultural Commodity Advisory Board); 7 Del. C. § 8001 (Appalachia States Low-Level Radioactive Waste Commission); 16 Del. C.

The definition of "public body" in FOIA also includes a body "specifically charged by any other public official, body, or agency to advise or make reports, investigations, or recommendations." In Guy v. Judicial Nominating Commission, Del. Super., 659 A.2d 777 (1995) (Ridgely, Pres. J.) ("Guy"), the Superior Court held that the Governor's Judicial Nominating Committee "meets the broad criteria for the term 'public body.' It is an executive commission, appointed by a public official, which is specifically charged by the Governor to make recommendations." 659 A.2d at 781.

In The News-Journal Co. v. Billingsley, Del. Ch., 1980 WL 10016 (Jan. 29, 1980) (Hartnett, V.C.) ("Billingsley"), the Chancery Court found that the Delaware Association of Professional Engineers was not charged by statute to advise public bodies. "The fact that the Association or its Council (as plaintiffs claim) may have rendered advice to various public agencies as to the enforcement of this section of the Professional Engineer Act does not change" this result. 1980 WL 10016, at p. 2. "That it may choose to render advice or make recommendations is irrelevant," where there is no specific statutory charge. Id. Even though the Association was required to submit annual reports to the Governor, General Assembly, and State Auditor, those reports were not a "specific charge" to advise or make recommendations to another public body.

In Billingsley, the Association argued that it was not a state agency, but rather a private professional association. The Chancery Court, however, concluded that "[i]t makes no difference whether the Association or its Council are State agencies or not for the purpose of deciding whether they are subject to the provisions of the Freedom of Information Act. What is controlling is whether the Association or its

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§ 9303 (Health Resource Board).

Council is a public body as that term is defined in the Freedom of Information Act." Id., at p. 4. Since the Association received and expended public funds, it was subject to FOIA.[3]

(b) "Public business" means any matter over which the public body has supervision, control, jurisdiction or advisory power.

In McLaughlin, the Wilmington City Council argued that 11 of its 13 members were not discussing "public business" when they met to consider the repeal of a state tax law, because they did not have supervision or control over whether the General Assembly repealed the statute or not. Nor did they exercise any advisory power over the General Assembly, since "everyone has a right to offer advice and opinion to members of a legislative body." 377 A.2d at 361. The Chancery Court disagreed. "[T]he purpose of the gathering was not merely for academic discussion on the repeal of a statute which would have no effect upon the City. Rather it was to consider possible action by the General Assembly which, if taken, could have abolished the Wilmington wage tax and thereby compelled a restructuring of City finances, both matters over which City Council clearly had control, supervision and jurisdiction." Id.

In Opinion 94-IO36 (Dec. 15, 1994), this Office determined that meetings between the Newark City Council and the President of the University of Delaware did not violate the open meeting law**,** because all that was discussed was a building and construction plan proposed by the University. "Since the University is exempt from the Newark City Council's Zoning Code, it does not appear that this is a matter

[3]After Billingsley was decided, the General Assembly enacted 24 Del. C. § 2828 to make it clear that the Association of Professional Engineers and its Council were a "public body" for purposes of FOIA.

‹over which the public body has supervision, control, jurisdiction, or advisory power.'" Opinion 94-IO36 (quoting 29 Del. C. § 10002(b)). But see Opinion 96-IBO2 (Jan. 2, 1996) (although the City Council argued that the purpose of the meetings was not to discuss public business, "the Act places the burden of proving the purpose of a gathering of a public body on the public body. The absence of minutes of the meeting or an agenda precludes findings on the subjects discussed at the meetings").

In Opinion 96-IB32 (Oct. 10, 1996), this Office determined that the school board, in a nonpublic meeting, did not violate FOIA because the board members were only asked to comment on the proposed transfer of teachers. The authority to transfer was vested in the school superintendent, not the board, and did not need to be approved by the board. Since the matter was presented to the board only as a courtesy, it was not one over which the board had "supervision, control, jurisdiction or advisory power," and therefore did not involve "public business."

(c) "Public funds" are those funds derived from the State or any political subdivision of the State.

As originally enacted, FOIA excluded from the definition of "public funds" monies in the form of grants-in-aid, but in 1982 the General Assembly "deleted the grants-in-aid exclusion." Solid Waste Authority, 480 A.2d at 633. At the time the Solid Waste Authority began operations, the exclusion still applied, but the Supreme Court refused to believe that grants-in-aid included "the initial appropriations the Authority received to begin operations. There is no evidence that such funds were other than a regular budgetary appropriation, ..." Id. (citations omitted). The Authority also argued that the public monies it received were de minimis, compared to the monies it generated on its own. That argument, however,

"ignores the plain language of the Act," which defined "public body" to include any entity supported in whole or in part by public funds." Id. (quoting 29 Del. C. Section 10002(a)(1)) (emphasis added).

In Billingsley, the Chancery Court found that the Delaware Association of Professional Engineers was a public body for purposes of FOIA because it was supported by and expended public funds. By statute, "all persons registered to practice as professional engineers in Delaware" must be "members of the Association and shall be required to pay initial and renewal fees to the Association. These fees are public funds within the meaning of the Freedom of Information Act since they are required to be paid before one may engage in the practice of engineering in Delaware." 1980 WL 10016, at p. 2.

(e) "Meeting" means the formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business.

In Solid Waste Authority, the Supreme Court considered whether the Authority's standing committees were subject to the open meeting requirements of FOIA. "This issue presents a clash between the plain words of a statute and the newspaper's demand for virtually total access to a State agency." 480 A.2d at 634. The Court did not decide whether the committees were or were not public bodies for purposes of FOIA. Rather the Court assumed that, even if they were, they still were not "within the comprehension of [FOIA]" (id.) because the statute defined a public "meeting" to mean any "formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business." 29 Del. C. Section 10002(e). A quorum of the seven-member Authority was five, but none of the standing committees had more than four members.

The Supreme Court saw the quorum requirement as "legislative deference to the internal operation

procedures of public bodies . . . [T]he quorum requirement embedded in section 10002(e) of the Act represents a legislative attempt, based on public policy reasons, to limit the reach of the open meeting law. . . . This brightline standard is a legislative recognition of a demarcation between the public's right of access and the practical necessity that government must function in an orderly, but nonetheless legitimate, basis. The gathering of information and the free exchange of ideas should not be hampered at the outset, and thus dampen a careful examination of potentially controversial matters, before the Authority can even function. . . . The public's right of access at later stages in the decision making process, and its accompanying right to question, is a strong safeguard that public servants remain accountable to the citizens. Any interpretation of the Act beyond its obvious purpose and intent could bring the wheels of government to a halt." 480 A.2d at 634.

Meetings by less-than-a-quorum of a public body may still violate the open meeting provisions of FOIA, if they appear to be a deliberate attempt to circumvent the requirements of the law. "[O]ne purpose of sunshine laws is to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance, that rarely could there be any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors, and that a sunshine statute, being for the benefit of the public, should be construed so as to frustrate all such evasive devices." McLaughlin, 377 A.2d at 362.

In McLaughlin, the City Council cited a Pennsylvania case which held that a meeting between a superintendent and a school board to provide information was a "work session" and not a meeting required to be open to the public. The Chancery Court distinguished the Pennsylvania open meeting statute, which applied only "to meetings where ‹formal action' was taken. Our law is not so limited. Rather it applies to

meetings called to discuss public business as well as to meetings called to take action on public business." Id.

In Levy, the Chancery Court again rejected the notion that FOIA only applied to meetings where a public body intended to take "formal" action, but did not apply to a school board "workshop" held at a local restaurant. Under that interpretation, "there would be no remedy to deter Board members from privately meeting for discussion, investigation or deliberation about public business as long as the Board reached no formal decision at that private meeting. Such a construction ignores the statement in Section 10001 that citizens have the right to monitor decisions of public officials in formulating public policy and the requirement that discussions or deliberations, as well as action, on public business shall be conducted openly." 1990 WL 154147, at p. 6. The courts in other states "have noted that 'action' by a public body includes fact gathering, deliberations and discussions, all of which surely influence the public entity's final decision." Id. FOIA "also recognizes that policy decisions by public entities cannot realistically be understood as isolated instances of collective choice, but are best understood as a decisional process based on inquiry, deliberation and consensus building. Because informal gatherings or workshops are part of the decision-making process they too must be conducted openly." Id.

In Tryon v. Brandywine School District, Del. Ch., 1989 WL 134875 (Nov. 3, 1989) (Hartnett, V.C.), the president of the school board called individual board members on the telephone to ask whether they were prepared to vote on a student assignment plan that was on the agenda for an upcoming public meeting. In some instances, the president asked the board members how they were inclined to vote, "but there is no evidence that [he] attempted to convince any board members to vote in a particular manner." 1989 WL 134875, at p. 1. Vice Chancellor Hartnett held that FOIA did not apply, because a quorum

of the school board was three members, and "[t]here is no evidence that three of the board members met or simultaneously spoke on the telephone concerning the public reassignment prior to the [public] meeting." Id., at p. 2.

In a later decision in Tryon, the court left open the possibility that there might be circumstances where FOIA applied to less-than-a-quorum of a public body, as other states have held.[4] But the telephone calls made by the president of the school board "to the various board members were not a means of circumventing [FOIA] through serial telephone conversations. Rather, these phone conversations were merely a means by which [the president] could informally poll the Board to find out how each member was likely to vote on the proposal. There is no evidence that [the president] tried to convince any Board member to adopt a particular point of view . . . [His] only purpose was to gain a general sense of the Board's position and to determine if they would be ready to vote at the Board meeting . . . There is no evidence that [he] made a series of calls or called repeated meetings to try to sway the Board members' votes, ..." 1990 WL 51719, at p. 3.

In Opinion 96-IBO2 (Jan. 2, 1996), this Office determined that a city council had violated the open meeting provisions of FOIA by scheduling a series of three luncheon meetings, with only two members of the seven-member council present, to discuss building plans and related traffic matters. The city contended that none of these sessions was a public meeting, because no quorum of the city council was present on

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[4] See Blackford v. School Bd. of Orange County, Fla. App., 375 So.2d 578 (1979); Booth Newspapers, Inc. v. University of Mich. Bd. of Regents, Mich. App., 481 N.W.2d 778 (1992) (meetings of subquorum groups to select new university president constituted "constructive quorum" for purposes of open meetings act); Tri-Village Publishers v. St. Johnsville Bd. of Ed., App. Div., 487 N.Y.S.2d 181 (1985) (series of less-than-quorum meetings on a particular subject could thwart the purposes of the open meetings law).

any one date. This Office observed that the General Assembly had amended the definition of "public body" in FOIA, to include temporary, special, or ad hoc committees such as those that attended the luncheon meetings. "The formation of three ad hoc committees to meet with the same university staff to discuss essentially the same topics was a scheme to avoid compliance with the Act."

Whether FOIA applies to joint meetings, involving less-than-a quorum of two government agencies, can only be decided on a case-by-case basis. In Allen-Deane Corp. v. Township of Bedminster, N.J. App., 379 A.2d 265 (1977), members of county and local planning boards met to discuss environmental issues. The New Jersey court held that there was no "reason why a joint discussion meeting of several public bodies with respect to matters of mutual public concern should not be as fully subject to the [state freedom of information] act as is a discussion meeting of a single public body with respect to matters of public concern." 379 A.2d at 268. Accord Joiner v. City of Sebastopol, 125 Cal.App.3d 799 (1981) (two members of the city council and two members of the city planning commission (both less than a quorum of their respective bodies) met to consider legislative initiatives; the court held that their meeting was required to be open to the public). But see Woodbury Daily Times Co. v. Gloucester County Sewerage Authority, N.J. App., 386 A.2d 445 (1978) (meeting between local sewerage authority and representatives of the state department of environmental protection was not subject to the open meeting law, because the meeting was "informational" only and "not for the purpose of official action").

(f) "Agenda" shall include but is not limited to a general statement of the major issues expected to be discussed at a public meeting, as well as a statement of intent to hold an executive session and the specific ground or grounds therefor under subsection (b) of Section 10004 of this title.

In Ianni v. Department of Elections of New Castle County, Del. Ch., 1986 WL 9610 (Aug. 29, 1986) (Allen, C.) ("Ianni"), the only public notice of a board meeting was a one-page notice affixed to the door of the board's office on the third floor of the Carvel State Office Building, which stated that the subject for consideration at that meeting would be "primary election." When the Board met, it voted to open fewer polling stations in New Castle County in the primary elections. Chancellor Allen held that this notice was insufficient "to alert the public to the fact that the Board would consider and act upon a proposal to consolidate election districts for the purpose of the primary election. While the statute requires only a ‹general statement' of the subject to be addressed by the public body, when an agency knows that an important specific aspect of a general subject is to be dealt with, it satisfies neither the spirit nor the letter of the Freedom of Information Act to state the subject in such broad generalities as to fail to draw the public's attention to the fact that that specific important subject will be treated. In this instance, all that would have been required to satisfy this element of the statute would have been a statement that ‹election district consolidation' or ‹location of polling places' was to be treated." 1986 WL 9610, at p. 5.

(g) "Public body," "public record" and "meeting" shall not include activities of the University of Delaware and Delaware State College, except that the Board of Trustees of the University and the Board of Trustees of the College shall be "public bodies," and University and College documents relating to the expenditure of public funds shall be "public records," and each meeting of the full Board of Trustees of either institution shall be a "meeting."

The General Assembly amended FOIA in 1990 to exempt the University of Delaware and Delaware State College from the scope of the statute. See 67 Del. Laws c. 281, s.194 (June 26, 1990).

Even though the University of Delaware may be exempted from FOIA, the open meeting requirements may still apply to city council members who attend a meeting sponsored by the University.

"[A] meeting as defined in Section 10002(e) does not cease to be a meeting because the Council gathers as a result of an invitation of another public official or body. If the ‹gathering' is ‹for the purpose of discussing public business,' it would be a meeting within the scope of the Act, regardless of whether the University or the Council initiated the breakfast." Opinion 94-IO36 (Dec. 15, 1994).

SECTION 10003. EXAMINATION AND COPYING OF PUBLIC RECORDS

(a) All public records shall be open to inspection and copying by any citizen of the State during regular business hours by the custodian of the records for the appropriate public body.

FOIA's definition of "public body" is expansive, and includes almost every department, agency, board, or commission of the State or its political subdivisions.

The Attorney General's Office has determined that state agencies may deny requests for access to public records by individuals who are citizens of other states. See Opinion 91-IO03 (Feb. 1, 1991) ("Non-Delaware citizens, therefore, may be denied access completely."); Opinion 96-IB01 (Jan. 2, 1996) (Maryland resident cannot invoke the open meeting law). It is within the discretion of the agency, however, to honor a FOIA request from a non-citizen.

But what about a Delaware corporation? Or a company incorporated under the laws of another state that does business in Delaware? "It is generally accepted that, at very least for jurisdictional purposes, a corporation is considered a citizen of the state that created it." Zazanis v. Jarman, Del. Super., 1990 WL 58158, at p. 3 (Mar. 20, 1990) (Herlihy, J.). A corporation, however, "is not a citizen of a state for every purpose," and a statutory provision that utilizes "the term 'citizen' must be construed to determine if their benefits were intended to be conferred on corporations." Id. This Office has interpreted the term "citizen" in FOIA to include "corporate citizens" of Delaware. Opinion 91-IO03 (Feb. 1, 1991).

A corporation organized under the laws of another state "has no right under the statute to access public records or to appeal the denial of such disclosure." Statewide Building Maintenance, Inc. v. Pennsylvania Convention Center Authority, Pa. Commwlth., 635 A.2d 691, 697 (1993). In Pennsylvania, a local attorney can make a request for public records, in his or her own name, on behalf of a client who

is not a Pennsylvania citizen. Id. This also is often done by Delaware attorneys. So long as the request is made in the attorney's own name, it is not a ground for non-disclosure that the request is made on behalf of an out-of-state individual or corporation.

As a general rule, "[t]he underlying purpose of [a FOIA] request . . . cannot affect the right of an otherwise entitled citizen to access public records." Opinion No. 91-IO03 (Feb. 1, 1991). See New Castle County Vocational-Technical Education Association v. Board of Education of New Castle County Vocational-Technical School District, Del. Ch., 1978 WL 4637 (Sept. 25, 1978) (Brown, V.C.) (union could use FOIA to obtain list of members of another union, even if for competitive advantage). Similarly, under the federal FOIA, disclosure "cannot turn on the purposes for which the request for information is made"; and the statute "'give[s] any member of the public as much right to disclosure as one with a special interest [in a particular document].'" United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 771 (1989) (quoting NLRB v. Sears Roebuck & Co., 421 U.S. 132, 149 (1975)). The purpose of the request, however, is relevant in cases where "the objection to disclosure is based on a claim of privilege . . . ." Reporters Committee, 489 U.S. at 771. See discussion infra at pp. 33-37 (trade secrets) and pp. 52-53 (personal privacy).

Public records must be maintained at the agency's regular place of business, unless they have been archived under standard operating procedures. See Opinion 81-FO05 (May 7, 1981) (FOIA "gives to all citizens the right to enter administrative buildings for the purpose of inspecting or copying public records"). In Opinion 94-IO30 (Oct. 19, 1994), this Office determined that the city council had violated FOIA by failing to maintain audit records "in the public offices of the Town Council." Instead, the records were maintained in the private residence of one of the council members on a hard disk, which malfunctioned

and lost the records. This Office directed the council to notify in writing within thirty days how it intended to "resurrect" the public records, and also to make "arrangements . . . to maintain public records in a public place located in the [City]."

Section 10003, by its terms, requires "a citizen to appear to inspect and copy the requested public records." Opinion 96-IB13 (May 6, 1996). A public body may require that all citizens seeking access to public records must "personally present themselves for that purpose." Id. "While a public agency can certainly respond to a request by telephone, mail or facsimile, the agency may also request the citizen to personally present themselves for that purpose." Id.

Although a public body must ordinarily produce original public records for inspection and copying, the General Assembly has created an exception for documents filed with the Secretary of State. Notwithstanding FOIA, the Secretary is authorized to issue only photocopies, microfiche, or electronic image copies of public records. See 1994 Del. Laws c. 245, amending 8 Del. C. Section 391(c).

The issue sometimes arises as to whether public records which a citizen has requested exist at all. In Opinion No. 93-IO23 (Aug. 31, 1993), the city produced all of its files responsive to a FOIA request, but the citizen insisted that there was "another file." This Office found no FOIA violation, after the city's attorney and records custodian submitted affidavits, swearing that they had made a diligent search of the city's files and no additional responsive documents existed. See also Opinion 95-IB34 (Oct. 24, 1995) (counsel certified in writing "that the District has provided all the documents and public records available in response to the Complainant's document request").

Reasonable access to and reasonable facilities for copying of these records shall not be denied to any citizen.

FOIA does not define the terms "reasonable access" or "reasonable facilities." Where there is a lack of published case law interpreting the Delaware FOIA, the Attorney General's Office has made "frequent reference to the Federal Freedom of Information Act," 5 U.S.C. Sections 550-559, which is "substantially similar, but not identical, to [the Delaware FOIA]." Opinion 91-IO03 (Feb. 1, 1991). The federal FOIA generally requires a ten-day response. Accordingly, this Office has interpreted "reasonable access" to mean that a government agency "should, within ten (10) days after the receipt of a definitive request, issue a written determination to the requestor stating which of the requested records will, and which will not, be released and the reasons for any denial of a request. If the records are not known to exist or are not in the [agency's] possession, the requestor should be so informed." Id.

This ten-day response time may be extended: "(1) When there is a need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request; (2) When there is a need to search for, collect, and examine a voluminous amount of separate and distinct records; and (3) When there is a need for consultation, which shall be conducted with all practicable speed, with another agency or agency counsel." Id. The touchstone is the modifier "reasonable," which will be judged under the circumstances of the particular case. See Opinion 94-IO30 (Oct. 19, 1994) (unreasonable for the town not to comply with a request for public records for almost ten weeks).

Following the lead of the federal courts, this Office has stated that "[b]road, sweeping requests lacking specificity" do not have to be honored under FOIA. "It is the duty of the requestor to frame the

request with sufficient specificity so that it is not excessively broad." Id. "'[I]f the administrative burden imposed upon an agency by a request is 'unreasonable.' . . . courts may in their discretion decline to order disclosure. This rationale should be equally applicable to [the Delaware FOIA]." Opinion 91-I003 (quoting Ferri v. Bell, 645 F.2d 1213, 1220 (3rd Cir. 1981)). See also Opinion 95-IB24 (Aug. 7, 1995) ("Since the description of the documents sought was not sufficient to allow the City to locate such records, the request lacks specificity.").

In Mooney v. Board of Trustees of Temple University, Pa. Supr., 292 A.2d 395 (1972), students asked to inspect all financial and budgetary information of the university. The Pennsylvania Supreme Court held this was "'not a reasonable request for identifiable records, but rather a broad, sweeping indiscriminate request for production lacking any specificity.'" 292 A.2d at 397 n.8 (quoting Irons v. Schuyler, 321 F. Supp. 628, 629 (D.D.C. 1970)). In Schuyler, the FOIA request was for all unpublished manuscript decisions of the Patent Office. The federal district court held that "'[a]ll decisions' is not a reasonable identifiable description any more than asking for all the books in a particular library or all of the unpublished decisions of the United States District Courts . . . ." 321 F. Supp. at 629.[5]

It is not enough for a public body to claim "an administrative burden on a very small staff." See Opinion 96-IB13 (May 6, 1996). Like the federal FOIA and the public records laws in many other states, the Delaware FOIA does not contain an exception to disclosure for requests deemed by a public agency as burdensome or time-consuming. Whether a request sufficiently describes the public records sought, so

[5]See also Linder v. Eckard, Iowa Supr., 152 N.W.2d 833, 836 (1967)(request for "all" records on file in public office "would impose an intolerable burden on the public officer . . . [and] an unreasonable and harmful interference with the day-to-day conduct of public business").

that they can be located with reasonable effort, is a distinct issue from whether there might be administrative burden involved. Every public records statute "contemplates that there will be some burden in complying with a records request . . . ." State Board of Equalization v. Superior Court, 10 Cal.App.4th 1177, 1190 n.14 (1992). If a request for public records sufficiently identifies the documents sought, "the burden imposed on the agency is irrelevant." State of Hawaii Organization of Police Officers v. Society of Professional Journalists, Haw. Supr., 927 P.2d 386, 403 (1996). A public agency may have a legitimate ground not to disclose public records if the request is so vague that the agency "does not know what plaintiff wishes to see or where to locate it." Sears v. Gottschalk, 502 F.2d 122, 125-26 (4th Cir. 1974), cert. denied, 425 U.S. 904 (1976). But it is not grounds for withholding disclosure simply to cite "the sheer bulk of the material to which access was sought and the accompanying expense and inconvenience of making it available for inspection, ..." Id.

"Reasonable access" does not require a public body to provide on-line access to a computer database, for the convenience of the requesting party, even if that party is the media. "[T]he media is entitled to no greater access than the public in general." Opinion 94-IO11 (Mar. 7, 1994). Moreover, "[u]nlimited dissemination would also eliminate control over records" and could lead to unwarranted intrusions into personal privacy. Id. "In conclusion, the public has not been granted unlimited on-line access to court records under the common law or FOIA. The media does not have greater rights than the public." Id. (citing C. v. C., Del. Supr., 320 A.2d 717 (1974)).

If the record is in active use or in storage and, therefore, not available at the time a citizen requests access, the custodian shall so inform the citizen and make an appointment for said citizen to examine such records as expediently as they may be made available.

It is not a valid reason to deny disclosure just because the agency uses a private storage firm. "The FOIA requirements cannot be circumvented by delegation of regular duties to one specially retained to perform the same task as the regular employee or official." City of Fayetteville v. Edmark, Ark. Supr., 801 S.W.2d 275, 279 (1990). Where public records are not exempt from disclosure but are in the hands of private parties in privity with the state, "the [public records law] mandates that the burden be placed on the appropriate state agency to make arrangements for reasonable access to the records in its office or the office of the private custodian." Swaney v. Tilford, Ark. Supr., 898 S.W.2d 462, 465 (1995) (records in the possession of an outside accounting firm doing consulting work for the state).

In Tober v. Sanchez, Fla. App., 417 So.2d 1053 (1982), the head of a county transit agency denied a request for public records on the ground that the bus accident reports sought had been sent to the county attorney. The Florida appeals court reversed. "To permit an agency head to avoid his responsibility simply by transferring documents to another agency or office would violate the stated intent of the Public Records Act, as well as the rule that a statute enacted for the benefit of the public is to be accorded a liberal construction." 417 So.2d at 1054.

FOIA, however, cannot be used to compel production of documents in the possession of a private contractor. "[T]he mere act of contracting with a public body to construct a public improvement does not mean that the private contractor" is subject to the public records law. Harold v. Orange County, Fla. App., 668 So.2d 1010, 1011 (1996). When a general contractor contracts out some of the work for a state agency, the general contractor's "private negotiations with its 'subcontractors' are not necessarily a proper subject of public scrutiny. Simply because a government agency contracts with a private corporation, the affairs of the corporation do not become the affairs of the government." KMEG Television, Inc. v. Iowa

State Board of Regents, Iowa Supr., 440 N.W.2d 382, 385 (1989). See also Durham Herald Co. v. North Carolina Low-Level Radioactive Waste Management Authority, N.C. App., 430 S.E.2d 441, 444, cert. denied, 435 S.E.2d 334 (1993) (a private contractor is not "[a]n agency of the North Carolina government or its subdivisions").[6]

Any reasonable expense involved in the copying of such records shall be levied as a charge on the citizen requesting such copy.

In Opinion 94-IO13 (Mar. 15, 1994), a citizen lodged a complaint against the Wilmington Firefighters Association alleging that it unreasonably denied access to public records by charging $.50 per page, pursuant to Section 302 of the City of Wilmington's Rules of Public Access to Records. This Office determined that there was no FOIA violation, even though the charge covered not only the actual costs of copying, but also "the costs incurred in locating and producing such records." Moreover, the charge was not unreasonable because "the custodian of those records may waive or reduce the applicable fee where special circumstances appear," and the $.50 per page charge "is in keeping with fees charges by other public bodies."

(b) It shall be the responsibility of the public body to establish rules and regulations regarding access to public records as well as fees charged for copying of such records.

This Office has interpreted the imperative "shall" to mean "a mandatory requirement in the context

[6]There may be instances where records of a private contractor must be provided to the government by the express items of a public contract. See Harold, supra (private contractor required to break out bids of minority subcontractors to ensure compliance with local procurement laws). Or the state agency may have an exclusive ownership right to documents produced by the contractor, in which case the agency can compel their production. See Pathmanathan v. St. Cloud State Univ., Minn. App., 461 N.W.2d 726 (1990).

of complying with the procedural requirements of [FOIA]." Opinion 91-IO03 (Feb. 1, 1991). Where an agency has not promulgated a rule or regulation, it can charge only the actual cost of copying with no administrative surcharge. See Opinion 95-IB08 (Feb. 6, 1995) (charge for employee time to search for and copy public records not provided for in the school district's regulations; "[t]he monies therefore must be released in excess of which its regulations permitted").

On December 2, 1996, this Office issued its "Policy and Procedures under the Freedom of Information Act for Charging for the Costs of Copying Documents." The basic charge is $.50 per page, but can be waived if the public interest would be served.

SECTION 10002(d). "PUBLIC RECORD."

"‹Public record' is information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced."

This is an expansive definition. The original statute applied only to "written or recorded information made or received by a public body relating to public business." See 60 Del. Laws c. 641. In 1985, the General Assembly amended the definition to bring it more in line with the increasing use of computer data bases by government agencies. See 65 Del. Laws c. 191, s.3.

Like the federal FOIA, this definition "makes no distinction between records maintained in manual and computer storage systems. . . . It is thus clear that computer-stored records, whether stored in the central processing unit, on magnetic tape or in some other form, are still ‹records' for purposes of FOIA." Yeager v. Drug Enforcement Administration, 678 F.2d 315, 321 (D.C. Cir. 1982). "Although accessing information from computers may involve a somewhat different process than locating and retrieving manually-stored records, those differences may not be used to circumvent the full disclosure policies of the FOIA. The type of storage system in which the agency has chosen to maintain its records cannot diminish the duties imposed by FOIA." Id.

Under federal law, "[i]t is well settled that an agency is not required by FOIA to create a document that does not exist in order to satisfy a request." Yaeger, 678 F.2d at 321 (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 161-62 (1975)). "A requestor is entitled only to records that an agency has in fact chosen to create and retain. Thus, although an agency is entitled to possess a record, it need not obtain or regain possession of a record in order to satisfy a FOIA request." Yaeger, 678 F.2d at 321.

See also Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 152 (1980) ("the Act does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained.").

This Office has concluded that the law in Delaware is the same. "FOIA does not require a public body 'to create a record where the requested record does not exist.'" Opinion 96-IB28 (Aug. 8, 1996) (quoting Hartzell v. Mayville Community School District, Mich App., 455 N.W.2d 411, 412 (1990)). Furthermore, FOIA does not require a public body "'to compile the requested data from' other public records that may exist." Opinion 96-IB28 (Aug. 8, 1996) (quoting DiRose v. New York State Department of Correctional Services, App. Div, 627 N.Y.S.2d 850 (1995)).

FOIA does not require an agency to make a summary or compilation of information in public records, or to produce computerized data in a special format requested by a citizen. It is not "necessary for a computer operator to create new records through a 'computer run,' i.e., a search of the online database, accomplished by entering the [requesting party's] search criteria." Gabriels v. Curiale, App. Div., 628 N.Y.S.2d 882 (1995). Nor does FOIA obligate an agency to "develop a program to accomplish this task for the purpose of complying with [the FOIA] request." Id. If the agency claims that portions of a computer data base are exempt from disclosure, then the agency may be required "to develop a special computer program which would delete exempt information." Hamer v. Lentz, Ill. Supr., 547 N.E.2d 191, 195 (1989).

A public body cannot be liable under FOIA for failure to produce lost or destroyed public records. "'[A]n agency is not required to recreate a document that no longer exists' because if the agency 'is no longer in possession of the document, for a reason that is not itself suspect, then the agency is not

improperly withholding that document.'" Workmann v. Illinois State Board of Education, Ill. App., 593 N.E.2d 141, 144 (1992) (quoting Safecard Services, Inc. v. SEC, 926 F.2d 1197, 1201 (D.C. Cir. 1991)). "When an agency has demonstrated that it has conducted a reasonable search for all relevant documents, it has discharged its obligations under FOIA . . . ." Elliott v. Triangle H.D.F. Corp., 1994 WL 18504, at p. 3 (S.D.N.Y., Jan. 18, 1994). "Mere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them." Safecard Services, 926 F.2d at 1201.

For purposes of this chapter, the following records shall not be deemed public:

As amended, FOIA exempts from disclosure fourteen categories of records. Each of these exceptions "is intended for the protection of personal privacy." Solid Waste Authority, 480 A.2d at 631.

In Chrysler Corp. v. Brown, 441 U.S. 281 (1979), Chrysler sought to bar disclosure of information it had provided to the Defense Logistics Agency regarding employment of women and minorities at its Newark, Delaware plant. Chrysler argued that the records fell within the exception for privileged or confidential commercial or financial information, and sought an injunction to bar release of those records. Although the records fell within the FOIA exemption, the Supreme Court held that FOIA did not "require an agency to withhold exempted material." 441 U.S. at 291. The federal FOIA (5 U.S.C. § 552(a)) "places a general obligation on the agency to make information available to the public . . . Subsection (b), 5 U.S.C. § 552(b), which lists the exemptions, simply states that the specified material is not subject to the disclosure obligations set out in subsection (a). By its terms, subsection (b) demarcates the agency's obligation to disclose; it does not foreclose disclosure." 441 U.S. at 292.

Delaware's FOIA is similarly structured, as are the public records laws in many other states. State courts have followed the lead of the Supreme Court in Chrysler. See, e.g., Rhode Island Federation of Teachers v. Sundlun, R.I. Supr., 595 A.2d 799 (1991) (public officials have discretion to disclose exempted materials); Hanig v. Department of Motor Vehicles, Ct. App., 580 N.Y.S.2d 715, 718 (1992) ("[e]ven where records fall within an exemption, an agency in its discretion may disclose them in whole or in part").

(1) Any personnel, medical or pupil file, the disclosure of which would constitute an invasion of personal privacy, under this legislation or under any State or federal law as it relates to personal privacy;

In Opinion 95-IB09 (Feb. 13, 1995), this Office determined that apprenticeship agreements with the Division of Employment & Training, which were stamped "CONFIDENTIAL," fell within the personnel file exemption under FOIA. That exemption was "'intended for the protection of personal privacy.'" Opinion 95-IB09 (quoting Solid Waste Authority, 480 A.2d at 631). It protects the "'intimate details of a person's life, including any information that might subject the person to embarrassment, harassment, disgrace, or loss of employment or friends.'" Id. (quoting Trombley v. Bellows Falls Union High School District, Vt. Supr., 624 A.2d 857 (1993)). If the agreements had not been stamped confidential, there would be a lesser expectation of privacy, and the public interest in investigating wage rates might tip the balance in favor of disclosure. See also discussion infra at pp. 47-48 (a public body cannot override FOIA with promises of confidentiality).

In Opinion 94-IO19 (May 7, 1994), this Office determined that the birthdates of State employees fall within the "personnel exception" to FOIA. Such personal information "is irrelevant to the public's interest in observing government business. The fact that individuals accept employment with the State does

not eliminate their privacy concerns in personal information. Under this analysis of FOIA, information about Delaware employees relevant to public business, such as title, agency, salary, overtime, etc. may be disclosed, but personal information should be withheld." Id.

In Opinion 96-IB30 (Sept. 25, 1996), this Office determined that scholarship applications fell within the pupil file exception to disclosure. The applications required the students to submit copies of their academic transcripts and their parents' income tax returns. "[T]here can be no doubt that a student's academic transcript constitutes part of a 'pupil file, the disclosure of which would constitute an invasion of personal privacy.'" Id. [7]

This Office has repeatedly determined that the salaries of public employees must be disclosed under FOIA. See Opinion 77-27 (Aug. 4, 1977) (names, job classifications, and salaries of State employees); Opinion I-78-37 (Mar. 10, 1978) (gross salary paid to state employees); Opinion 96-IB13 (May 6, 1996) (salaries of municipal employees). In Opinion 95-IB13 (Mar. 20, 1995), this Office reiterated that the salaries of the employees of school districts enjoyed no exemption under FOIA. The only Delaware case on point held that while "some might feel that the amount of their salary is personal, it is generally recognized that the public has a legitimate interest in knowing the salaries of persons who are paid with public funds and public employees have no right of privacy in this information." Gannett Co. v. Colonial School District, Del. Super., C.A. No. 82M-DE26 (Aug. 10, 1983) (Balick, J.). [8]

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[7]In other opinions, this Office has also determined that the documents requested were not subject to disclosure under Section 10002(d)(1). See, e.g., Opinion 95-IB34 (Oct. 24, 1994) (teacher's personnel records); Opinion 88-I028 (Dec. 2, 1988) (medical files of persons making claims against health insurers, contained in reports made to the Insurance Commissioner).

[8]In 1995, legislation was introduced (H.B. 180) to amend FOIA to exempt from disclosure "the salaries and pensions of individual school employees and State employees." Because public

There is no information more private and subject to legal protection against disclosure than social security numbers. "[T]he extensive use of Social Security numbers as universal identifiers" in the public sector is "'one of the most serious manifestations of privacy concerns in the Nation.'" International Brotherhood of Electrical Workers v. United States Department of Housing & Urban Development, 852 F.2d 87, 89 (3rd Cir. 1988) (quoting S. Rep. No. 1183, 93d Cong., 2d Sess.). See also discussion infra, at pp. 40-41 (Privacy Act of 1974). But even if public salary records contain social security numbers, those records may still have to be produced, albeit in redacted form. It is not enough to warrant non-disclosure to claim that redacting the records would cause undue "administrative burden." Opinion 96-IB13 (May 6, 1996).

(2) Trade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature;

Under Delaware law, a trade secret is "confidential and proprietary information" which, if "falls into a rival's hands" will cause "serious competitive disadvantage." ID Biomedical Corp. v. TM Technologies, Inc., Del. Supr., 1994 WL 384605, at p. 4 (July 20, 1994). "Faced with objections based on trade secret or proprietary information, courts have applied tests that look first to whether the information sought is indeed a trade secret and whether disclosure of such information will be harmful to the objecting party." MacLane Gas Co. v. Enserch Corp., Del. Ch., 1989 WL 104931, at p. 2 (Sept. 11, 1989) (Chandler,

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salaries are available "though examination of the State Budget Act, the Delaware Code, and the collective bargaining agreements of the various public school districts," disclosure of "salaries and pensions paid to particular employees does not further the public interest, but, instead, subjects individuals whose salaries are disclosed to potential embarrassment and invasions of privacy." That bill was not enacted into law.

V.C.).

In Opinion 77-029 (Sept. 27, 1977), this Office relied on cases under the federal FOIA trade secrets exception, which "uses language nearly identical to Delaware's Sunshine Law." Id. Commercial or financial information "'is confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.'" Id. (quoting National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) (footnote omitted). See also United Technologies Corp. v. Department of Health & Human Services, 574 F. Supp. 86, 89 (D. Del. 1983).

Trade secrets, on the other hand, "consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.'" Opinion 77-029 (Sept. 27, 1977) (quoting Restatement of Torts Section 757, comment b). The factors in determining whether information is a trade secret are: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended developing the information: and (6) the ease or difficulty with which the information could properly be acquired or duplicated by others. Opinion 77-029 (citing Space Aero Products, Inc. v. R.E. Darling Co., Md. App., 208 A.2d 74 (1965)).

In Opinion 87-IO31 (Nov. 4, 1987), this Office determined that personal financial statements filed by licensees with the Alcoholic Beverage Control Commission contained confidential information and were not disclosable under FOIA. The exemption for confidential financial information was intended "'broadly to protect individuals from a wide range of embarrassing disclosures.'" Id. (quoting Gregory v. FDIC, 470 F. Supp. 1329, 1334 (D.D.C. 1979), rev'd in part on other grounds, 631 F.2d 896 (D.C.Cir. 1980)). "The release of information regarding one's assets, profits and losses, stock holdings, loans and collateral" are confidential financial information. Opinion 87-IO31.

In Opinion 96-IB30 (Sept. 25, 1996), this Office determined that the tax returns of parents of children applying for scholarships were exempt from disclosure under FOIA. "[T]he tax returns of the parents or guardians of the scholarship applicants undeniably constitute 'financial information . . . of a privileged or confidential nature.'" Id. (quoting 29 Del. C. Section 10002(d)(2)). See Seaford Funding v. M & M Associates, Del. Ch., 1996 WL 255886, at p. 2 (Apr. 9, 1996) (Steele, V.C.) (tax returns "contain confidential and sensitive information to which the public has no right"). Tax returns are also protected from disclosure by statute. See 30 Del. C. Section 368 (prohibiting disclosure of tax returns by any State officer or employee).

The trade secrets exception comes up often in public contracts, when a losing bidder asks to see the proposal submitted by the winning bidder, as well as documents evidencing how the agency decided to award the contract. As a general rule, responses to a government agency's request for proposal "are public records subject to the provisions of the Freedom of Information Act." Computer Co. v. Division of Health & Social Services, Del. Ch., 1989 WL 108427, at p. 3 (Sept. 19, 1989) (Hartnett, V.C.). See Opinion 77-037 (Dec. 28, 1977) (bid packages are information "received by a public body" and therefore

subject to FOIA, unless they contain trade secrets or confidential or privileged information, in which case they may be redacted).

In Hecht v. Agency for International Development, C.A. No. 95-263-SLR (D. Del., Dec. 8, 1996), federal contractors argued that information they submitted to the federal government was exempt from disclosure as trade secrets. The contractors sought to prevent disclosure of employee resumes, claiming that would open the door to recruitment by competitors. The federal district court found that "[t]he possibility of another company recruiting away one's employees is present in nearly every industry, . . . [and] [t]he possibility that contractors would suffer substantial harm in this manner resulting from the disclosure of their employees' biographical data appears remote." Slip. op. at 19. The contractors also sought to prevent disclosure of indirect cost rates (fringe benefits, overhead, and general and administrative costs). Although the unit prices charged to the government were not exempt from disclosure, the district court concluded that disclosure of the contractor's profit multiplier could result in an unfair competitive advantage, by enabling competing contractors "'to accurately calculate [the contractor's] future bids and its pricing structure . . . .'" Slip op. at 22 (quoting Gulf & Western Industries, Inc. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979)). The district court also held that information in bid proposals regarding the contractor's technical approaches need not be disclosed, because it contained details about the contractors' processes, operations, and style of work.

(3) Investigatory files compiled for civil or criminal law-enforcement purposes including pending investigative files, pretrial and presentence investigations and child custody and adoption files where there is no criminal complaint at issue;

In Billingsley, a newspaper sued the Delaware Association of Professional Engineers to disclose

documents relating to a complaint filed with the Association's Council alleging violations of the Professional Engineers Act. The Chancery Court observed that "the Council is authorized [by statute] to hear complaints and to take action which can result in the disciplining of registered professional engineers." 1980 WL 3043, at p. 1. Even though the Council had investigated the complaint and decided not to take any disciplinary action, the court held that the documents were not subject to disclosure under the investigatory file exception to FOIA. If disclosure were allowed, "there would be a chilling effect upon those who might bring pertinent information to the attention of the Association. Its ability to investigate would be crippled, and accordingly, its ability to maintain the qualifications of registered engineers would be impaired." Id., at p. 3.

Vice Chancellor Hartnett noted in Billingsley that the investigative file exception in the Delaware FOIA used language identical to the federal FOIA. Accordingly, the Chancery Court referred to federal cases, which "hold that Congress could not have possibly intended that [investigative records] should be disclosed once the investigation was completed, because if disclosure were made, it would soon become a matter of public knowledge. The result would be that few individuals would come forth to embroil themselves in controversy or possible recrimination by notifying the Agency of something which might justify investigation." 1980 WL 3043, at p. 2 (citing Evans v. United States Department of Transportation, 446 F.2d 821, cert. denied, 405 U.S. 918 (1971)).

In Duffy v. Oberly, Del. Supr., 567 A.2d 34, 1989 WL 90724 (July 25, 1989), a convicted criminal sued in Chancery Court to obtain records of his arrest from the Delaware State Police. The Supreme Court held that the Chancery Court's dismissal of the case was "clearly correct because the Delaware Freedom of Information Act expressly protects from disclosure investigatory files in criminal

cases. 29 Del. C. Section 10002(d)(3)." 1989 WL 90724, at p. 1.

The investigatory file exception does not apply only to the police or the Attorney General's Office. The courts in other states have held that various government agencies can invoke an exception to disclosure of public records for investigatory files. See, e.g., Tacoma News, Inc. v. Tacoma-Pierce County Health Department, Wash. App., 778 P.2d 1066 (1989) (county health department investigating complaints of inadequate ambulance care); Equitable Trust Co. v. State, Md. Spec. App., 399 A.2d 908 (1979) (state human relations commission investigating charges of racial discrimination). Not all files maintained by a law enforcement agency, however, are exempt from disclosure under a public records act. The data must be "part of investigatory files compiled by the [agency] for law enforcement or prosecution purposes." Equitable Trust, 399 A.2d at 920. Such files must "be prepared in connection with related government litigation and adjudicative proceedings currently under way or contemplated, ..." Id.

In Opinion 88-IO28 (Dec. 2, 1988), this Office determined that reports of medical malpractice claims that were required by statute to be filed with the Insurance Commissioner were public records subject to disclosure under FOIA. The reports did not fall under the investigatory file exception, because they were not used by the Insurance Commissioner for any "investigative purpose."

In Matter of Attorney General's Investigative Demand to Malamed, Del. Super., 493 A.2d 972 (1985) (O'Hara, J.), the target of a consumer fraud investigation moved to quash an Attorney General's subpoena, asserting the privilege against disclosure of trade secrets (customer lists). The Superior Court enforced the subpoena, noting that the list would not be subject to disclosure to third parties, because it was protected under 29 Del. C. Section 10002(d)(3), "which provides that investigatory files are not public records within the purview of the Freedom of Information Act." 493 A.2d at 976.

(4) Criminal files and criminal records, the disclosure of which would constitute an invasion of personal privacy. Any person may, upon proof of identity, obtain a copy of his personal criminal record. All other criminal records and files are closed to public scrutiny. Agencies holding such criminal records may delete any information, before release, which would disclose the names of witnesses, intelligence personnel and aids [sic] **or any other information of a privileged and confidential nature;**

In Nasir v. Oberly, Del. Super., 1985 WL 189324 (Dec. 5, 1985) (Bifferato, J.), a prisoner made a FOIA request to the State Bureau of Identification for witness statements and other documents generated in connection with a criminal investigation that resulted in his conviction. The Superior Court held that, under both exemptions (3) and (4), "the documents sought are not deemed to be public records and, therefore, not covered by the Freedom of Information Act."

State law prohibits the dissemination of information from the Delaware Criminal Justice Information System (DELJIS) except as authorized by statute. 11 Del. C. Section 8513 authorizes disclosure of such information to: (1) criminal justice agencies; courts; any person (or his or her attorney) who requests a copy of his or her own criminal history record; and the State Public Defender. See Opinion 90-IO08 (May 23, 1990) (Kent County Department of Inspections and Enforcement is not a criminal justice agency); Opinion 87-IO38 (Dec. 31, 1987) (Office of Auditor of Accounts is not a criminal justice agency authorized to receive DELJIS criminal history information); Opinion 94-IO10 (Mar. 7, 1994) (warrant applications, approvals, and other information contained in the DELJIS capias system were criminal records not disclosable under FOIA).

Where criminal record information is part of a larger document that otherwise is not exempt from disclosure, the public body must redact the criminal information before producing the records for inspection and copying. See Opinion 87-IO31 (Nov. 4, 1987) (criminal history of Alcoholic Beverage Control

Commission licensees); Opinion 95-IB12 (Mar. 7, 1995) (applications for certification by Board of Massage and Bodywork).

(5) Intelligence files compiled for law-enforcement purposes, the disclosure of which could constitute an endangerment to the local, state or national welfare and security;

There are no Delaware court decisions or Attorney General opinions regarding this exception.

(6) Any records specifically exempted from public disclosure by statute or common law;

This is one of the most important exceptions to the public records law.

Federal Statutes and Regulations

Many of the federal laws are concerned with personal privacy, especially in the areas of health, welfare, and student records. The Privacy Act of 1974, 42 U.S.C. Section 405(c)(2)(c), prohibits "a state from penalizing an individual in any way because of his failure to reveal his social security number upon receipt, except in certain narrowly defined circumstances." Doyle v. Wilson, 529 F. Supp. 1343, 1348 (D. Del. 1982) (Latchum, Ch. J.).[9] In enacting this law, "Congress sought to curtail the expanding use of social security numbers by federal and local agencies and, by so doing, to eliminate the threat to individual privacy and confidentiality of information posed by common numerical identifiers." 529 F. Supp at 1348. If a state cannot compel a person to give his or her social security number, except in limited circumstances, a fortiori it might violate that person's privacy rights to disclose public records containing a person's social security number, unless the document were redacted. See Opinion 96-IB13 (May 6, 1996).

[9]The statute provides an exception for state or local agencies "charged with the administration of any general public assistance, driver's license, or motor vehicle registration law . . . ." 42 U.S.C. § 405(c)(2)(C)(vi).

In 1974, Congress enacted the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (known as the "Buckley Amendment"). FERPA "generally prohibits institutions from releasing, or providing access to third parties of 'any personally identifiable information in education records.' Such disclosure is permitted, however, when: 'such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.'" United States v. Brown University, 1992 WL 2513, at p.1 (E.D. Pa., Jan. 3, 1992) (quoting 20 U.S.C. § 1232g(b)(2)(B)).

Federal law limits the disclosure of information about welfare recipients by state agencies that receive federal funding for public assistance programs. See 42 U.S.C. § 602(a)(g). Federal regulations also limit disclosure of records and information by state agencies relating to the national IV-D child support program. See 45 C.F.R. § 303.21. The disclosure of a wide variety of health records is also governed by federal law. See, e.g., 42 C.F.R. § 2.1 (drug abuse patient records); 42 C.F.R. § 2.2 (alcohol abuse patient records).

Another federal statute, 23 U.S.C. Section 409, prohibits disclosure of documents relating to federal-aid highway funds in order to '"facilitate candor in administrative evaluations of highway safety hazards . . . and to prohibit federally required record-keeping from being used as a 'tool' . . . in private litigation.'" Fuester v. Conrail, Del. Super., 1994 WL 463449, at p. 2 (July 12, 1994) (Ridgely, Pres. J.) (quoting Robertson v. Union Pacific R.R. Co., 954 F.2d 1433, 1435 (8th Cir. 1992)). In Fuester, the Superior Court held that "[t]he Supremacy Clause of the United States Constitution mandates that 23 U.S.C. Section 409 preempts any Delaware statutes or court rule on the same subject." 1994 WL

463449, at p. 2.

State Statutes

A trial court can keep the names of jurors confidential, and prohibit disclosure of records used in the juror selection process. See 10 Del. C. Section 4513. In State v. Pennell, Del. Super., 1989 WL 167445 (Oct. 2, 1989) (Gebelein, J.), aff'd, Del. Supr., 571 A.2d 735 (1990), the media claimed a right of access to the names of jurors in a criminal case, based both on the public records provisions of FOIA, as well as on common law and First Amendment rights of access. The Superior Court held that 10 Del. C. Section 4513 was a statutory exception to disclosure under Section 10002(6) of FOIA. "The rules of statutory construction require that for consistency in effectuating the manifest intent of the General Assembly laws be construed with reference to each other to retain the viability of pre-existing law." 1989 WL 167445, at p. 4. Even though FOIA was enacted later in time, it could not be construed to repeal Section 4513 because "[r]epeal by implication is not favored in Delaware." Id., at p. 5. "Reading the FOIA in conjunction with 10 Del. C. Section 4513(a) and (b) . . . this Court concludes that the Court clearly has the authority to keep jury lists confidential and that when the Court determines the lists should be confidential, then the records relating thereto are not public records under the FOIA." 1989 WL 167445, at p. 4.

Of the state statutes that limit or prohibit disclosure of documents, among the more commonly cited are:

> 7 Del. C. §§ 6014, 6304, 9116 -- information submitted to the Department of Natural Resources and Environmental Control;
>
> 11 Del. C. § 4322 -- case records of the Department of Corrections;

11 Del. C. § 9200(c)(12) -- records of disciplinary grievance procedure involving law enforcement officers;

14 Del. C. § 4111 -- student records (e.g., test scores, discipline, guidance counselor reports, psychological or medical reports);

24 Del. C. § 1191 -- records and proceedings of the Board of Dental Examiners;

24 Del. C. § 1768 -- records and proceedings of the Board of Medical Practice;

29 Del. C. §§ 4805, 4820 -- information submitted by lottery licensees to the Department of Finance;

30 Del. C. § 368 -- state tax returns;

31 Del. C. § 3813 -- records of the Department of Family Services.

For many years, Delaware law authorized the Division of Motor Vehicles to provide virtually unlimited access to driver's records. See 21 Del. C. § 305. In 1996, the General Assembly enacted new legislation in accordance with the federal Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-25. Effective August 24, 1997, it is unlawful for DMV to disclose personal information from its driver's records except as specifically authorized by statute. See 21 Del. C. § 305 (Supp. 1996).

Constitutional Exemptions

Although exemption (6) refers only to "statute or common law," "it would be incongruous to hold that the General Assembly intended a statutory exemption but not an exemption based upon the constitution to be sufficient to preclude disclosure. I find that the word ‹statute' within the meaning of this exemption under [FOIA] is sufficiently inclusive to embrace provisions of the State Constitution." Guy, 659 A.2d at 782.

In Guy, the Superior Court recognized a constitutional basis for executive privilege, stemming from

the doctrine of separation of powers. "'Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties.'" 659 A.2d at 782 (quoting United States v. Nixon, 418 U.S. 683, 705 (1974)). Executive privilege, however, "is not absolute. Unlike most evidentiary privileges, it is for the benefit of the public, not the executive who asserts it." Guy, 659 A.2d at 782. "The privilege serves the purpose of protecting the effectiveness of the overall governmental system. . . . Whether a claim of executive privilege is sustained, therefore, depends upon whether the need for protecting the confidentiality of executive communications outweighs the litigant's need for disclosure." Id. In Guy, the Superior Court found that the balance weighed in favor of the privilege, because "[p]laintiff has demonstrated no need for disclosure of the [Judicial Nominating] Commission's records and thus has failed to carry his burden of proof to overcome the presumption of executive privilege." Id.

Common Law Privileges

Attorney-Client/Work Product

Among other things, FOIA protects the common law privileges of attorney-client and attorney work product. Where "the General Assembly has specifically authorized denial of inspection of 'privileged information' . . . we conclude that the privileges for attorney-client communication and attorney work product established by common law have been incorporated into the Open Records Act." Denver Post Corp. v. University of Colorado, Col. App., 739 P.2d 874, 880 (1987).

In Common Cause of Delaware v. Red Clay Consolidated School District Board of Education, Del. Ch., 1995 WL 733401 (Dec. 5, 1995) (Balick, V.C.) ("Red Clay"), the school district argued that a letter sent by its attorney to an attorney representing the State Board of Education was not a public

record disclosable under FOIA because it was a confidential communication protected by attorney-client privilege. "A communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client." 1995 WL 733401, at p. 5 (citing D.R.E. 502(a)(5)). Vice Chancellor Balick held that the letter was not covered by attorney-client privilege. "The purpose of the letter was to obtain the State Board's support of the open enrollment plan at a special meeting on Sunday, May 15. The minutes show that the letter was read at the public meeting. . . . In these circumstances, defendants cannot successfully claim that the letter was a confidential communication." 1995 WL 733401, at p. 5.

The work product doctrine has been codified in the rules of civil discovery. See Ch. Ct. Civ. Rule 26(b)(3); Super. Ct. Civ. Rule 26(b)(3). As a rule of discovery, "the work-product rule is not a privilege but a qualified immunity protecting from discovery documents and tangible things things prepared by a party or his representative in anticipation of litigation." Admiral Insurance Co. v. United States District Court for the District of Arizona, 881 F.2d 1486, 1494 (9th Cir. 1989). There still is, however, "a general and persuasive common-law work product privilege" that was recognized by the United States Supreme Court "prior to the adoption of both state rules of civil procedure and public records statutes." Killington, Ltd. v. Lash, Vt. Supr., 572 A.2d 1368, 1377 (1990) (citing Hickman v. Taylor, 329 U.S. 495 (1947)).

The scope of the work-product privilege under a state public records act is equivalent "to the scope and application of the work-product exemption in [Rule 26(b)(3) of the civil discovery rules]. A contrary rule would produce an anomalous and unfair result. [I]t would effectively nullify [civil rule] 26(b)(3) as it applies to government attorneys, and would create an unwarranted advantage for parties in litigation with the government, since whatever lay outside the scope of discovery under Rule 26 would be accessible

through the Access to Public Records statute." Killington, 572 A.2d at 1379.

In Killington, the Vermont Supreme Court held that the work-product privilege "is not confined to court litigation. There is little basis to distinguish contested administrative proceedings from court proceedings. The Legislature has long assigned adjudicative functions to state boards, and as our society grows more complex and specialized, the role of government agencies with formal party status in such trial-like adjudicative proceedings is bound to expand. It would elevate form over function if we established a work-product rule governing agency appearances in our courts and another rule governing what are essentially full-blown adversarial proceedings before administrative bodies." 572 A.2d at 1379.

A frequently litigated issue is whether a settlement agreement between a government agency and a private party must be disclosed under the public records law. Very often, there is a confidentiality clause in the settlement agreement, which neither party wants to breach. Claims that such agreements are protected by attorney-client privilege or work product immunity have not been well received by the courts.

The attorney-client privilege almost never applies to such agreements, because "[b]y their very nature, the settlement agreements were necessarily intended to be disclosed to third parties, i.e., opposing parties and their attorneys . . . Communications are not confidential if they are made for purposes of disclosure to third parties." Heritage Newspapers, Inc. v. City of Dearborn, Mich.Cir., 1995 WL 688259, at p. 3 (Apr. 20, 1995). Nor does work product immunity afford much protection.

In Dutton v. Guste, La. Supr., 395 So.2d 683 (1981), plaintiff sought to compel disclosure of documents concerning the settlement of claims between architects and engineers and the State of Louisiana over defects in the design and construction of the Superdome. Although the state public records law had an exception for attorney work product, the Louisiana Supreme Court held that it did not apply. "[W]e

are unable to say that the agreements are of the type obtained or prepared in anticipation for trial. On the contrary, we consider that the documents were prepared in an attempt to conclude the litigation between these parties by settlement." 395 So.2d at 685. An Ohio court reached the same conclusion in State ex rel. Kinsley v. Berea Board of Education, Ohio App., 582 N.E.2d 653 (1990). "A settlement agreement is not a record compiled in anticipation of or in defense of a lawsuit. It simply does not prepare one for trial. A settlement agreement is a contract negotiated with the opposing party to prevent or conclude litigation." Id. at 663.

"An agency simply cannot bargain away its Public Records Act duties with promises of confidentiality in settlement agreements." Tribune Co. v. Hardee Memorial Hospital, Fla. Cir., 1991 WL 235921 (Aug. 26, 1991). "[A]ssurances of confidentiality by the County regarding the settlement agreement are inadequate to transform what was a public record into a private one." Register Division of Freedom Newspapers, Inc. v. County of Orange, 158 Cal.App.3d 893, 909 (1984). As stated by the Alaska Supreme Court, "a public agency may not circumvent the statutory disclosure requirements by agreeing to keep the terms of a settlement agreement confidential." Anchorage School District v. Anchorage Daily News, Alaska Supr., 779 P.2d 1191, 1193 (1989). Although the court recognized "that some litigants are unwilling to settle unless the terms of settlement remain confidential," the state public records law reflects a legislative "policy determination favoring disclosure of public records over the general policy of encouraging settlement." Id.

In Register Division, Orange County argued that it was in the public interest to keep its settlement policy and decisions secret, for if known to the public it would lead to frivolous tort claims filed against the County. But the California appeals court found that there was a more compelling "public interest in finding

out how decisions to spend public funds are formulated and in insuring governmental processes remain open and subject to public scrutiny." 158 Cal.App.3d at 907.

"[T]wo types of public interests" mandate disclosure of settlement agreements by government agencies: "(1) the public's right to know whether a public official or a public employee has been charged with official misconduct (and whether such charges have been tacitly admitted) and (2) the financial impact upon the public of a litigation settlement which is paid either with public funds or with insurance proceeds generated by publicly financed insurance premiums (which premiums are adjusted based upon claims experience)." Daily Gazette Co. v. Withrow, W.Va. Supr., 350 S.E.2d 738, 743 (1986). Accord News and Observer Publishing Co. v. Wake County Hospital System, Inc., N.C. App., 284 S.E.2d 542, 549 (1982) ("the public has a right to know the terms of settlements made by the [county hospital system] in actions for wrongful terminations since the funds from which the settlements were paid must be considered the county's funds").

Governmental Privileges

Rule 508 of the Delaware Rules of Evidence recognizes "governmental privileges existing at common law, or created by the Constitution, statute or court rule of this State, ..." In Guy, the Superior Court found a governmental privilege, in the Governor's Office, of executive privilege, based both on the state constitution (separation of powers) and common law. "This privilege is sometimes also referred to as the 'state secret privilege,' the 'official information privilege,' or the 'deliberative process privilege.'" 659 A.2d at 782 (citations omitted). As part of the common law of evidence, "'the privilege arises from 'the common sense-common law principle that not all public business can be transacted completely in the open, that public officials are entitled to the private advice of their subordinates and to confer among themselves,

freely and frankly, without fear of disclosure, otherwise the advice received and the exchange of views may not be as frank and honest as the public good requires.'" 659 A.2d at 782 (quoting Soucie v. David, 448 F.2d 1067, 1080-81 (D.C. Cir. 1971) (Wilkey, J., concurring)).

In Morris v. Avallone, Del. Super., 272 A.2d 344 (1970) (Stiftel, Pres. J.), the Superior Court held "that there is a longstanding privilege which exempts government agencies or officials from disclosure of general material in their files at the instance of parties engaged in private litigation." 272 A.2d at 347 (citing Note, Discovery Against Federal Administrative Agencies, 56 Harv. L. Rev. 1125 (1943)). The Chancery Court, however, has expressed doubt whether this privilege applies to a case "between a private party and a governmental body." Artesian Water Supply Co. v. New Castle County, 1981 WL 15606, at p. 3 (Apr. 9, 1981) (Marvel, C.) ("Artesian Water").

The Chancery Court has held that no common law "deliberative process" privilege exists in Delaware. Chemical Industry Council of Delaware, Inc. v. State Coastal Zone Industrial Control Board, Del. Ch., 1994 WL 274295 at p. 12 (May 19, 1994) (Jacobs, V. C.) ("CIC"). See also Beckett v. Trice, Del. Super., 1994 WL 319171, at p. 3 (June 6, 1994) (Lee, J.) ("the 'deliberative process' privilege does not exist in Delaware"). Any protection for a public body's deliberative process was reflected in the statutory exceptions for executive session, as "the balance struck by the General Assembly between the goal of requiring a public body to conduct its public business in public, and the need to protect the public body's internal deliberative process. . . . Expressed in somewhat different terms, those nine exceptions are the public policy of Delaware." CIC, 1994 WL 274295, at p. 12.

In Guy, President Judge Ridgely recognized a constitutional "deliberative process" privilege for public records of the Executive Branch, based on the doctrine of separation of powers. The privilege,

when invoked by the Governor, applies if disclosure of Executive Branch records "would undermine the 'sensitive decisional and consultative responsibilities'" which "'can only be discharged freely and effectively under a mantle of privacy and security.'" 659 A.2d at 785 (quoting Nero v. Hyland, N.J. Supr., 386 A.2d 846, 853 (1978)).[10]

President Judge Ridgely distinguished the Chancery Court's decision in CIC, because in that case the executive privilege was claimed by a state agency, and did not involve "communications to and from a governor." 1995 WL 270161, at p. 9 n.2. See Babets v. Secretary of the Executive Office of Human Services, Mass. Supr., 526 N.E.2d 1261, 1263 (1988) (court's refusal to extend executive privilege to a state agency "does not constitute the exercise of nonjudicial power or interfere with the Executive's power").

Delaware also recognizes a common law governmental privilege "to protect certain communications between witnesses and prosecutors." Guy, 659 A.2d at 782. "These communications 'are regarded as secrets of state, or matters the disclosure of which would be prejudicial to the public interests. They are therefore protected, and all evidence thereof excluded, from motives of public policy.'" Id. (quoting State v. Brown, Del. Oyer & Term., 35 A. 458, 463-64 (1896)). "It is logical that a common law which recognizes a governmental privilege extending to the Attorney General Under certain circumstances would also recognize a privilege extending to the Chief Executive of the State in the exercise of his appointive

[10] See also Brooks v. Johnson, Del. Supr., 560 A.2d 1001 (189), where the Supreme Court refused to allow plaintiff to depose members of the Medical Malpractice Review Panel. Since the panel members "are serving as adjudicatory officials," it would be "most irregular" to submit them to "interrogation regarding their mental or decisional processes in the proper performance of their official duties." 560 A.2d at 1003.

duties." Guy, 659 A.2d at 785.

The Superior Court has also recognized a common law governmental privilege protecting a deputy attorney general from examination about facts coming to his or her knowledge in the course of a state prosecution. That privilege, however, may be overcome if the party seeking the information can establish that it is "material evidence" and "cannot be obtained from any other source." Beckett v. Trice, Del. Super., 1994 WL 319171, at p. 4 (June 6, 1994) (Lee, J.).

The Delaware courts have been reluctant to accept other claims of governmental privilege to exempt disclosure of state agency documents. See Artesian Water, supra (no "self-evaluation" privilege); Lefferts v. J. C. Penney Co., Del. Super., 1989 WL 89652 (Aug. 3, 1989) (Balick, J.) (rejecting claim of qualified privilege for "official information"). Unlike the federal FOIA and the public records laws in other states, Delaware does not have an exemption for "interagency memoranda," nor have the courts recognized a privilege for "pre-decisional" documents.

Personal Privacy

One of the most important privileges affecting FOIA is the right of privacy. The Chancery Court has recognized a "common law right" of informational privacy. Board of Education of Colonial School District v. Colonial Education Association, Del. Ch., 1996 WL 104231, at p. (Feb. 28, 1996) (Allen, C.). See also Billingsley, supra (registered engineers have a "right of privacy" to personal information supplied to their trade association). The courts "will be required on a case by case basis to resolve the balance between legitimate privacy claims and the need for access to [public] information." Colonial School District, 1996 WL 104231, at p. 8.

The United States Supreme Court has long recognized a federal common law right of informational

privacy. In United States Department of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749 (1989), the Court observed that "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person." 489 U.S. at 763. Whether disclosure of a private document is warranted "must turn on the nature of the requested document and its relationship to 'the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny.'" Id. at 773. "That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct. In this case -- and presumably in the typical case in which one private citizen is seeking information about another -- the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records." Id.

Based on federal court precedents, this Office has determined that the Division of Revenue need not disclose the names and addresses of Delaware business license holders. Such information is within the realm of traditional privacy, and disclosure does not "appear to further the purpose of FOIA to assure that the public processes and records of government are open." Opinion 96-IB33 (Dec. 11, 1996).

(7) Any records which disclose the identity of the contributor of a bona fide and lawful charitable contribution to the public body whenever public anonymity has been requested of the public body with respect to said contribution by the contributor;

There are no Delaware court decisions or Attorney General opinions regarding this exception.

(8) Any records involving labor negotiations or collective bargaining;

There are no Delaware court decisions or Attorney General opinions regarding this exception.

(9) Any records pertaining to pending or potential litigation which are not records of any court;

In Artesian Water**,** the county refused to produce documents relating to a leaking landfill which were prepared for a conference sponsored by the Environmental Protection Agency. Several years after that conference, the water company sued for damage caused to its underground well waters from the landfill. The county invoked the potential litigation exception to FOIA, but the Chancery Court concluded that conference was not a "strategy session looking towards trial of the pending case." 1981 WL 15606, at p. 3.

In Opinion 93-IO05 (Mar. 3, 1993), the town relied on the litigation exception to FOIA in response to a citizen's request for tax records. The only basis for the exception cited by the town was a letter of complaint by the citizen. This Office determined that "no litigation is now pending or potential based on [the complainant's] statements ten months ago." It was not enough, to invoke the potential litigation exception to FOIA, for the town to express its "belief" that there might be litigation over the disputed riparian rights.

Public records laws are "fundamentally designed to inform the public about agency action and not to benefit private litigants." NLRB v. Sears, Roebuck & Co., 421 U.S 132, 144 n.10 (1975). Accord NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (FOIA was "not intended to function as a private discovery tool"). Unlike Delaware's FOIA, the federal FOIA does not have an exemption from disclosure for pending litigation, and bills have been introduced in Congress to create such an exception to prevent the use of FOIA to circumvent the rules of civil discovery.

California has an exception in its public records act for documents "pertaining to pending litigation to which the public agency is a party, . . ." Cal. Gov. Code § 6254(b). The courts of appeals in California

have held that "the obvious purpose of this exemption is to prevent a litigant from obtaining a greater advantage against the governmental entity than would otherwise be allowed through normal discovery channels." City of Los Angeles v. Superior Court, Cal. App., 41 Cal. 4th 1083, 1090 (1996). Accord Roberts v. City of Palmdale, Cal. Supr., 5 Cal.4th 363 (1993).

The Rhode Island Supreme Court has also held that a state public records law "was not designed to provide an alternative method of discovery for litigants. The [Rhode Island] Superior Court Rules of Civil Procedure provide for litigation discovery and place appropriate limitations on the scope of that discovery. . . . It was never the Legislature's intent to give litigants a greater right of access to documents through [FOIA] than those very same litigants would have under the rules of civil procedure." Hydron Laboratories, Inc., v. Department of the Attorney General, R.I. Supr., 492 A.2d 135, 139 (1985).[11]

It is the policy of this Office that, when a Delaware state agency is a party to ongoing civil litigation, it can invoke the pending litigation exemption to FOIA and not disclose any documents in its files relating to that litigation except pursuant to the civil discovery rules. Even if the litigation is between private parties, the state agency can invoke the common law privilege of non-disclosure recognized in Morris v. Avallone, supra. The private parties will still have recourse to third-party subpoenas issued by the court to the state agency, but subject to the protection of the civil discovery rules.

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[11]The commentators have also recognized that FOIA creates an unlevel playing field that "may disadvantage the government's position in litigation." E. Tomlinson, Use of the Freedom of Information Act for Discovery Purposes, 43 Md. L. Rev. 119, 128 (1984). "First, a party in litigation with the government may obtain agency records without the knowledge of government counsel and then use those records to surprise him at trial or hearing. Second, the party may disrupt the government's preparation by seeking, perhaps on the eve of the trial or hearing, the release of records in the government's litigation files. . . . Third, a party may request the government to produce the same documents under the FOIA and in discovery, thus necessitating duplicative searches and releases." Id.

The "potential" litigation exemption under FOIA is understandably much narrower than the pending litigation exception, since the requesting party does not have the alternative mechanism of civil discovery in court. Moreover, it may benefit a state agency to produce unprivileged documents from its files in order to discourage unnecessary lawsuits and a waste of government resources. FOIA in this way can serve "an important function in assisting potential litigants to determine whether they have a valid claim." Tomlinson, supra, at 153. "[A] potential litigant's access to more complete information [in the possession of the government] may convince the litigant not to file suit or to accept an early settlement." Id. at 154.

Delaware appears to be unique in its potential litigation exception to the public records provisions of FOIA. Oregon has the closest exception, for records "pertaining to litigation" that "is reasonably likely to occur." Or. Rev. Stat. § 192. 500(1)(a). See Lane County School District No. 4J v. Parks, Ore. App., 637 P.2d 1383 (1981). The Oregon courts have held that this is a "limited statutory exemption," largely for the protection of the attorney client-privilege and attorney work product. Smith v. School District No. 45, Ore. App., 666 P.2d 1345, 1350 (1983).

In Missouri, the public records act exempts from disclosure records pertaining to "legal actions, causes of action or litigation." Rev. Stat. Mo. § 610.021(1). By using the terms "legal actions" and "causes of actions," the legislature must have intended the exception to apply to situations which predate the filing of a petition in court. Tuft v. City of St. Louis, Mo. App., 936 S.W.2d 113, 116 (1996). Blanket invocations of the pending litigation exception, however, will be scrutinized. As the court in Tuft cautioned" "Taken to extremes, virtually any controversial matter could be the subject of potential litigation and thus cited as a basis for closing virtually any record. Such an open ended application of the litigation exception would indeed be inconsistent with the requirement that exceptions to the Act be strictly construed. Where

the justification offered is potential as opposed to pending litigation, the governmental body should properly bear a heavy burden of demonstrating both a substantial likelihood that litigation my occur and a clear nexus between the document sought and the anticipated litigation." 936 S.W.2d at 118.

The Attorney General's Office will also look behind any non-disclosure based on the potential litigation exception to FOIA to make sure that it is not being used as an improper shield. See Opinion 93-IO05 (Mar. 3, 1993).

(10) Subject to subsection (f) of Section 10004 of this title with respect to release of minutes of executive sessions, any record of discussions held in executive session pursuant to subsections (b) and (c) of Section 10004 of this title;

In CIC, the State Coastal Zone Industrial Control Board argued that, since FOIA did not require it to produce minutes of executive sessions, the board did not have to produce tapes of discussions held in executive session. The disclosure exception for minutes of executive session applies only "'so long as public disclosure would defeat the lawful purpose for the executive session, but no longer.'" 1994 WL 274295, at p. 13 (quoting 29 Del. C. § 10004(f)). "The tapes are simply another form of verbatim recording of the executive sessions. Thus, a verbatim recording, like written minutes, would be exempt from disclosure only if the recorded discussions pertained to a lawful purpose for holding the executive session. Because no lawful statutory purpose for most of those discussions has been demonstrated, it follows that the Board has not justified withholding the tape recordings of those discussions." 1994 WL 274295, at p. 13.

(11) Any records which disclose the identity or address of any person holding a permit to carry a concealed deadly weapon; provided, however, all records relating to such permits shall be available to all bona fide law enforcement officers;

The General Assembly added this exemption in 1977. See 61 Del. Laws c. 55.

(12) Any records of a public library which contain the identity of a user and the books, documents, films, recordings or other property of the library which a patron has used;

The General Assembly added this exemption in 1982. See 63 Del. Laws c. 424.

(13) Any records in the possession of the Department of Correction where disclosure is sought by an inmate in the Department's custody;

The General Assembly added this exception in 1987 in response to the Supreme Court's decision in Jenkins v. Gulledge, Del. Supr., 449 A.2d 207 (1982). In Jenkins, plaintiffs sought access to their prison records under FOIA. Although 11 Del. C. Section 4322 prohibited disclosure of all "case records obtained in the discharge of official duty by any member or employee of the Department [of Corrections]," the prisoners argued that FOIA (which then had no exception for DOC records) impliedly repealed Section 4322. The Supreme Court disagreed, but to make it clear the General Assembly amended FOIA to create a new exception for records in the possession of the Department of Corrections. See 66 Del. Laws c. 143 (May 27, 1987). See also Brooks v. Watson, Del. Supr., 663 A.2d 486 (1995) (Section 10002(d)(13) exempts "prison records sought by inmates from the definition of ‹public record'").

(14) Investigative files compiled or maintained by the Violent Crimes Compensation Board.

The General Assembly added this exemption in 1994. See 1994 Del. Laws c. 250, s.1.

SECTION 10004. OPEN MEETINGS

(a) Every meeting of all public bodies shall be open to the public except those closed pursuant to subsections (b), (c), (d) and (g) of this section.

The Supreme Court emphasized in Solid Waste Authority that the "open meeting laws are liberally construed." 480 A.2d at 631. The General Assembly, however, has excepted the proceedings of several boards from the purview of the open meeting law, in statutes other than FOIA. See, e.g., 13 Del C. § 2105 (Domestic Violence Coordinating Council); 24 Del. C. § 1191 (Board of Dental Examiners); 24 Del. C. § 1768 (Board of Medical Practice); 31 Del. C. § 3810(c) (meetings of the Foster Care Review Board "at which individual cases are discussed or reviewed shall not be subject to § 10004 of Title 29"). The recently enacted House Bill 205 further exempts deliberations in case decisions by the Industrial Accident Board, the Human Relations Commission, and the Tax Appeals Board.

For a public meeting to be truly "open," it must be held in a place where those wanting to attend can be accommodated. Must the public body accommodate all persons who want to attend the meeting? This Office has agreed with the courts in other states that FOIA may be violated if the facility provided for a public meeting is inadequate. "'When the meeting place may not be large enough to accommodate all the people who may wish to attend, the governmental unit must balance the public right of access against the burdens that providing additional public access would impose on the governmental unit.'" Opinion 96-IB23 (June 20, 1996) (quoting State v. Village Board of Greendale, Wis. Supr., 494 N.W.2d 408, 420 (1993)). If the meeting place is too small to accommodate all interested members of the public, the open meeting law may be violated if the selection of the meeting site was unreasonable. In making that decision, we "need not look for optimal outcomes, but must seek to determine whether the local governmental unit

achieved a reasonable balance under the circumstances presented at the time its decision was made.'" Opinion 96-IB23 (quoting Greendale).

In Opinion 96-IB23 (June 20, 1996), the county had noticed a public meeting to discuss zoning issues at the county's offices in Georgetown. More people than expected showed up, and one of the citizens complained that the meeting should have been moved from the county's offices to one of the courtrooms. This Office concluded that the county had selected a reasonable site for the meeting, which could not be moved at the last minute because no courtroom was open or available.

"Open to the public" also means that members of the public attending the meeting should have an opportunity to participate actively, subject to reasonable time and other controls. This Office has encouraged a public body "to fulfill its statutory obligation to have an open public meeting by answering questions by the citizens at public meetings. . . [A public body] should make diligent efforts to answer valid, bona fide, good faith questions by its citizens. Otherwise, the statutory mandate contained in 29 Del. C. Sections 10001 and 10004(a) is not being met by the [public body]." Opinion 94-IO23 (June 21, 1994). A public body, however, can restrict the opportunity for public comments to a designated time on the agenda.

This Office has closely examined various types of meetings to ensure "that no artificial rationales were employed to circumvent the specific requirements imposed on public bodies by FOIA." Opinion 96-IB02A (Oct. 17, 1996). Because each case is fact-driven, "it would be virtually impossible to consider all possible types of circumstances under which a FOIA complaint might or might not be appropriate." Id.

For example, this Office has determined that "breakfast meetings" held by a school board with staff

members to make "suggestions for betterment of the school system" involved the "discussing of public business" and therefore were subject to the open meeting law. Opinion 95-IB04 (Jan. 23, 1995). See also Opinion 94-IO07 (Feb. 2, 1994) (informal meeting of members of city council at local fire hall); Opinion 94-IO33 (Nov. 28, 1994) (school board's practice of meeting in Superintendent's office prior to public meeting violated FOIA); Opinion 95-IB35 (Nov. 1, 1995) (same). In contrast, in Opinion 95-IB20 (June 15, 1995), this Office found no FOIA violation where the school board held administrative staff meetings (attended by less than a quorum of the board), so long as the board members who attended did not make "any formal or informal, express or implied recommendations" to the full board based upon what was discussed at the administrative staff meetings.

In Opinion 96-IB11 (Mar. 20, 1996), this Office rejected the town council's argument that "workshops" did not discuss "public business" under FOIA. The "workshops" conducted by the town council discussed personnel policies (pay, vacation, reimbursement) for town employees, matters over which the council had "supervision, control, jurisdiction, and advisory power." 29 Del. C. Section 10002(b). This Office distinguished Kansas City Star Co. v. Fulson, Mo. App., 859 S.W.2d 934 (1993), where a workshop held by the school board "[c]entered around the basic concepts of productive human interaction. The workshop included an analysis of each board member's role in the group interaction and process of decision making." 859 S.W.2d at 941. In contrast, the city council at its workshop discussed "salary policies, personnel policies for Town employees, employees' pay policy for docking pay without required written approval for vacation, procedures for issuing monies out of the cash drawer, and leave and departure policies for [Town] employees."

In Opinion 96-IB26 (July 25, 1996), a private trade association invited members of the county

council to tour a manufacturing facility in Pennsylvania. Two of the council members (less than a quorum) chose to attend. This Office determined that the public meeting law was not violated, because the council did not appoint members as a committee to attend; rather, their attendance was voluntary and by personal choice. This Office distinguished Opinion 95-IB04 (Jan. 23, 1995), where the board members who attended breakfast meetings were deemed a "committee" subject to the open meeting laws, because "they later made recommendations to the full [School] Board based on action proposed at the breakfast meetings."[12] This Office cautioned the council, however, "to keep in mind that non-public activities of Council members, such as the tour in question, will always be viewed with suspicion by the public and the courts."

As noted by the Supreme Court in Solid Waste Authority, the quorum element of the definition of "public meeting" in section 10002(e) serves as a legislative "demarcation between the public's right of access and the practical necessity that government must function on an orderly, but nonetheless legitimate, basis." 480 A.2d at 634. The quorum element, however, only provides a neat divide when the public body is a statutorily authorized number. When the public body is a state agency or department within the Executive Branch, a literal application of the open meeting law can have unintended consequences.

The courts in other states have wrestled with this same problem. The Missouri open meeting law applies to all "public governmental bodies," including "any state body, agency, board, bureau, commission, committee, department, division or any political subdivision of the state . . . ." Rev. Stat. Mo. Supp. 1975 § 610.10(2). In Tribune Publishing Co. v. Curators of the University of Missouri, Mo. App., 661 S.W.2d

[12]See also Opinion 96-IB02A (Oct. 17, 1996) (meeting of public officials "was not in the form of an informational presentation," but "were more like working sessions of a public body").

575 (1983), the state appeals court began its construction of the statute by assuming that the legislature did not "intend an unreasonable, oppressive or absurd result." 661 S.W.2d at 583. "Notwithstanding the well-intentioned efforts of the legislature, it is patent that the statutory definition of 'public governmental body' . . . is so prolix as to raise the specter of an overly expansive meaning going far behind the legislative intent inherent in the 'Sunshine Law.'" Id. The court construed the open meeting law to apply only to those bodies which had "the power to govern by the formulation of policies and the promulgation of statutes, ordinances, rules and regulations, or the exercise of quasi-judicial power." 661 S.W.2d at 584. In this way, the court struck a "pragmatic balance" by not "opening to the public carte blanche the vast majority of [administrative] meetings." To hold otherwise "would be unduly disruptive, counter-productive to administrative efficiency, and non-productive as a practical matter . . . ." 661 S.W.2d at 584. "Securing government accountability at the decisional level is one thing. Adversely affecting administrative efficiency at the non-decisional level is quite another thing. It is inconceivable that the salutary goal of letting the 'sunshine' in on meetings of 'public governmental bodies' envisioned elimination of all intermediate layers of ozone to the extent of crippling or impeding the day-to-day efficiency of purely administrative functions." Id.

The courts in Florida, also by judicial interpretation, have excluded from the scope of the state sunshine law meetings between executive officers and their subordinates. See City of Sunrise v. News & Sun-Sentinel Co., Fla. App., 542 So.2d 1354 (1989) (meeting of mayor and city transportation director to discuss employee disciplinary matters); Cape Publications, Inc. v. City of Palm Bay, Fla. App., 473 So.2d 222 (1985) (meeting between city manager and personnel director to discuss general criteria for recruitment of new chief of police). As stated forcefully by one Florida court of appeals:

> [F]requent and unpublicized meetings between an executive officer and advisors, consultants, staff or personnel under his direction, for the purpose of "fact-finding" to assist him in the execution of those duties, are not meetings within the contemplation of the Sunshine Law . . . . It would be unrealistic, indeed intolerable, to require of such professionals that every meeting, every contact, and every discussion with anyone from whom they would seek counsel or consultation to assist in acquiring the necessary information, data or intelligence needed to advise or guide the authority by whom they are employed, be a public meeting within the disciplines of the Sunshine Law. Neither the letter nor the spirit of the law require it.

Bennett v. Warden, Fla. App., 333 So.2d 97, 99-100 (1976).

In National Park Medical Center, Inc. v. Arkansas Department of Human Services, Ark. Supr., 911 S.W.2d 250 (1995), the Arkansas Supreme Court held that meetings between the director of the Department of Human Services and his staff to develop bid solicitations for medical service provider contracts were not subject to FOIA. The Arkansas open meeting law applies to all "governing bodies," including "all boards, bureaus, commissions, or organizations of the State of Arkansas, ..." The state supreme court refused to apply the law as literally written, "[b]eing mindful of the administrative nightmare that would ensue if such staff meetings "were subject to FOIA," and consistent "with a long-held rule that statutory construction required a common sense approach . . . ." 911 S.W.2d at 254. See also SJL of Montana Associates Ltd. Partnership v. City of Billings, Mont. Supr., 867 P.2d 1084 (1993) (FOIA did not apply to a meeting between the city engineer and the public works director with a contractor to discuss construction delays on a municipal building project).

State officials are confronted every day with possible FOIA issues. If a Cabinet Secretary or

Division Director calls a meeting with subordinates to discuss State business, is that a meeting that must be open to the public? FOIA's definition of a "public body" covers any "department" or "agency" of the State, including any "ad hoc committee" of a department or agency. Does that mean that any meeting of two or more employees of a department or agency is subject to the open meeting requirements of FOIA? Clearly not. As observed by the Missouri Court of Appeals: "Securing government accountability at the decisional level is one thing. Adversely affecting administrative efficiency at the non-decisional level is quite another thing." Tribune Publishing, 661 S.W.2d at 584.

A reasonable balance to strike is to exclude from the coverage of FOIA meetings between a public official and his or her advisers, staff, employees, or other consultants to discuss issues and provide necessary information for executive decision-making. Thus, in Metropolitan Air Research Testing Authority, Inc. v. Metropolitan Government of Nashville & Davidson County, Tenn. App., 842 S.W.2d 611 (1992), the director of the city's division of purchases met with various city officials to discuss a procurement contract. "At most, the officials attending the meeting were providing the purchasing agent with their opinions concerning whether he should award the contract to the company that submitted the lowest bid." Id. Since the "decision on whether to award the contract rested with the purchasing agent. . . [and he] could have made a decision without the meeting" the state sunshine law "did not require this meeting to be open to the public." Id.

(b) A public body may call for an executive session closed to the public pursuant to subsections (c) and (e) of this section, but only for the following purposes:

(1) Discussion of an individual citizen's qualifications to hold a job or pursue training unless the citizen requests that such a meeting be open. This provision shall not apply to the discussion by a licensing board or commission which is subject to the provisions of Section 8810 of this title, of an individual citizen's qualifications to pursue any profession or occupation for

which a license must by issued by the public body in accordance with Delaware law;

29 Del. C. Section 8810 is the enabling statute for the Division of Professional Regulation. Title 24 boards and commissions must satisfy the open meeting requirements of FOIA when they are discussing an applicant's qualifications for a professional or occupational license.

(2) Preliminary discussions on site acquisitions for any publicly funded capital improvements;

There are no Delaware court decisions or Attorney General opinions construing this exception.

(3) Activities of any law-enforcement agency in its efforts to collect information leading to criminal apprehension;

There are no Delaware court decisions or Attorney General opinions construing this exception.

(4) Strategy sessions, including those involving legal advice or opinion from an attorney-at-law, with respect to collective bargaining or pending or potential litigation, but only when an open meeting would have an adverse effect on the bargaining or litigation position of the public body;

In CIC, Vice Chancellor Jacobs rejected the argument by the State Coastal Zone Industrial Control Board that it could meet in private with counsel to revise proposed regulations. "A narrow, limited interpretation of the 'legal advice' exception" to FOIA was consistent with the legislative history of the act, which the General Assembly had amended in 1985 to narrow its scope to prevent potential abuse." 1994 WL 274295, at p. 11. Even though the Board's regulations were likely to be the subject of litigation, the "wholesale use of executive sessions to review the public's comments; to debate, discuss, and share views concerning the evolving revisions of the Regulations; and to draft new regulatory language, went far beyond

strategizing with its counsel about potential litigation." Id.

In Beebe Medical Center v. Certificate of Need Appeals Board, Del. Super., 1995 WL 465318 (June 30, 1995) (Terry, J.), aff'd, Del. Supr., 1996 WL 69799 (Jan. 26, 1996) ("Beebe"), the Board met in executive session, with counsel, to consider applications from two competing hospitals. After reviewing a transcript of the executive session, the Superior Court found that the discussion "ranged beyond what is permissible in the context of pending or potential litigation, ..." 1995 WL 465318, at p. 5. But the court did not think it appropriate to void the action taken, as authorized by Section 10005 of FOIA. See discussion infra at pp. 81-83.

In Red Clay, the school board went into executive session with counsel to discuss matters relating to the federal desegregation suit. There was no dispute that litigation was pending. "The only issue on the propriety of strategy sessions is whether an open meeting would have an adverse effect on the Board's litigation position. At the time of the April meeting, Red Clay was seeking the State Board's support of the open enrollment plan and was trying to meet the deadline for filing a motion to modify the federal court's decree. Defendants' decision to hold an executive session to discuss legal strategy was clearly justified in those circumstances." 1995 WL 733401, at p. 3.

In Opinion 94-IO06 (Feb. 1, 1994), this Office rejected the contention that the public body had properly gone into executive session to discuss "legal" matters. There was no attorney present, nor was the public body considering confidential, written legal advice from an attorney. See also Opinion 93-IO06 (Mar. 5, 1993) (legal advice exemption "is limited to collective bargaining or pending or potential litigation").

(5) Discussions which would disclose the identity of the contributor of a bona fide and lawful charitable contribution to the public body whenever public anonymity has been requested of the public body with respect to said contribution by the contributor;

There are no Delaware court decisions or Attorney General opinions construing this exception.

(6) Discussion of the content of documents, excluded from the definition of "public record" in Section 10002 of this title where such discussion may disclose the contents of such documents;

In Opinion 96-IB30 (Sept. 25, 1996), this Office determined that it was proper for the school board to meet in executive session to consider scholarship applications, since the board had to review academic transcripts and parents' tax returns, which documents were exempt from disclosure under FOIA.

(7) The hearing of student disciplinary cases unless the student requests a public hearing;

There are no Delaware court decisions or Attorney General opinions construing this exception.

(8) The hearing of employee disciplinary or dismissal cases unless the employee requests a public hearing;

There are no Delaware court decisions or Attorney General opinions construing this exception.

(9) Personnel matters in which the names, competency and abilities of individual employees or students are discussed, unless the employee or student requests that such a meeting be open.

In Opinion 93-IO03 (Feb. 10, 1993), this Office determined that the city council violated FOIA when it went into executive session to discuss the mayor's expense accounts. The exception to discuss personnel matters applied only when the discussion reflects on an individual's "competence or ability."

Compare with Opinion 94-IO21 (Mar. 30, 1994) (discussion of employee contracts was a personnel matter that could be discussed in executive session). See also Opinion 95-IB35 (Nov. 2, 1995) (this exception does not encompass interviews with prospective employees).

In Opinion 96-IB27 (Aug. 1, 1996), a member of the school board claimed that the board improperly met in executive session to consider actions taken by the member on behalf of his daughter. This Office determined that the school board could invoke the personnel exception. "Although you claim that you were only acting as a concerned parent, the fact remains that you are also a member of the Board, and any action you take vis-a-vis a school guidance counselor, the principal, or other school employee could be perceived as taken in your official capacity as a member of the Board."

In Opinion 96-IB32 (Oct. 10, 1996), this Office determined that the school board properly went into executive session to consider reductions in force. The board discussed employee contracts, qualifications, and possible lateral transfers, all of which "directly involved the consideration of individual employees by name, competency, and ability."

This Office has determined that '"it is not necessary to identify the personnel in convening an executive session to constitute personnel matters.'" Opinion 96-IB27 (Aug 1, 1996) (quoting Nageotte v. Board of Supervisors of King George County, Va. Supr., 288 S.E.2d 423, 426 (1982)).

(c) A public body may hold an executive session closed to the public upon affirmative vote of a majority of members present at a meeting of the public body. The vote on the question of holding an executive session shall take place at a meeting of the public body which shall be open to the public, and the results of the vote shall be made public and shall be recorded in the minutes. The purpose of such executive sessions shall be set forth in the agenda and shall be limited to the purposes listed in subsection (b) of this section. Executive sessions may be held only for the discussion of public business, and all voting on public business must take place at a public

meeting and the results of the vote made public.

Under FOIA, "to convene in executive session, the public body must satisfy several requirements": (1) publicly announce the purpose of the closed sessions in advance thereof; (2) approve holding such a session by a majority vote; (3) limit the agenda of the closed session to public business that falls within one of the purposes allowed for such meetings; and (4) prepare minutes of any closed session and make them available as public records for public inspection. Levy, 1990 WL 154147, at p. 3. This Office has taken the position that the statutory exceptions for executive sessions "are exclusive and form the only basis for entering into closed session." Opinion 80-FOI3 (Aug. 30, 1980).

In Red Clay, Common Cause alleged that the school board had discussed matters in executive session beyond litigation strategy authorized by statute. The Chancery Court was not troubled by this alleged FOIA violation. "There is always a risk that a public body will drift into discussing matters beyond the proper purpose of an executive session. Fortunately, members were mindful of the Board's duties under the Act and sought legal advice when the propriety of private discussions was in doubt. When occasional lapses were brought to the members' attention, discussion of that subject would immediately cease." 1995 WL 733401, at p. 3. See Opinion 96-IB32 (Oct. 10, 1996) (minimal straying from authorized subjects for executive session did not amount to a FOIA violation).

In Opinion 94-IO21 (Mar. 30, 1994), this Office emphasized that "after the discussion of privileged topics is completed in executive session, the relevant vote must be done in public and the results made public." See Opinion 96-IB19 (June 3, 1996) (no affirmative vote by a majority of the members before going into executive session).

In Opinion No. 96-IB15 (May 10, 1996), this Office stated that "[t]here is no ‹straw polling'

allowed in executive sessions by a public body in the Act, nor does the Act allow public bodies to reach ‹consensus votes' which they strive to later ratify." Id. (citing Levy). Accord Opinion 96-IB32 (Oct. 10, 1996) ("consensus votes in executive session are prohibited").

(d) This section shall not prohibit the removal of any person from a public meeting who is willfully and seriously disruptive of the conduct of such meeting.

There are no Delaware court decisions or Attorney General opinions regarding this subsection.

(e)(1) This subsection concerning notice of meetings shall not apply to any emergency meeting which is necessary for the immediate preservation of the public peace, health or safety, or to the General Assembly.

There are no Delaware court decisions or Attorney General opinions regarding this subsection.

(2) All public bodies shall give public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least 7 days in advance thereof. The notice shall include the agenda, if such has been determined at the time, and the dates, times and places of such meetings; however, the agenda shall be subject to change to include additional items including executive sessions or the deletion of items including executive sessions which arise at the time of the public body's meeting.

FOIA defines an agenda as a "'general statement of the major issues expected to be discussed at a public meeting.'" See Ianni, supra. As stated by the Chancery Court, "[a]n agenda should be worded in plain and comprehensible language and must directly state the purpose of the meeting." CIC, 1994 WL 274295, at p. 8. "If a public body is uncertain as to what specific provisions or components of a complex proposal it will consider at an upcoming meeting, the agenda need not disclose each specific component of that proposal, so long as the agenda clearly and directly discloses the broader subject of which the components are a part." Id.

In CIC, the Chancery Court held that the State Coastal Zone Industrial Control Board violated FOIA when it published notice of a public meeting to consider proposed regulations. "[T]he notice did not disclose what turned out to be the sole purpose for the public session -- to vote on, and possibly adopt, the Regulations. . . . [T]he public had been given reasonable cause to believe that the Board would hold another public hearing at some later time later before adopting any regulations." CIC, 1994 WL 274295, at p. 9.

The notices also did not adequately to disclose the Board's intent to go into executive session. The notices simply stated: "The Board regularly moves into executive session for the purpose of receiving advice of counsel, engaging in strategy sessions, considering personnel information, or for any other purpose provided by law." To the Chancery Court, "[a] recital of several potential grounds for holding an executive session, concluding with a catch-all category such as 'any other purpose provided by law,' may have gratified a lawyers' instinct to 'cover all bases.' However, that approach did not satisfy the spirit or the letter of FOIA's mandate in Section 10002(f), that the notice disclose to the public the 'specific ground or grounds' for holding an executive session." CIC, 1994 WL 274295, at p. 10.

"FOIA contemplates that a closed session must be the exception, not the rule, for how a public body conducts its public business. Therefore, the statute requires the public body to justify its invocation of that exceptional procedure. It also requires the public body to inform the public in the notice of the executive session of its precise reason or reasons for convening in private. That was not done here. By simply enumerating in the notice one or more of the Section 10004(b) exceptions, even though most were not genuine or applicable, the Board left the public in the dark as to what the closed sessions were all about. To validate this approach would permit a public body to meet in closed session without public

accountability." CIC, at p. 10.

In Red Clay, Vice Chancellor Balick appeared to take a less strict view. FOIA "simply requires public bodies to disclose the purpose of the executive sessions in the agenda." Red Clay, 1995 WL 733401, at p. 4. The act does not require the public body "to specify what legal, personnel, or other subjects are discussed in executive sessions." Id., at p. 4.

In Opinion 95-IB15 (Mar. 24, 1995), this Office determined that the town council violated the open meeting law by failing to state in the agenda that the council intended to consider reducing the mayor's compensation for serving as a judge. Even though the town council posted an amended agenda the day before the meeting, that notice failed "to state the reasons for delay in posting the revised agenda." See also Opinion No. 95-IB26 (Aug. 15, 1995) (agenda posted by town council failed to mention the proposed eviction of a tenant; but a subsequent special meeting of the council, properly noticed, "ratified its previous illegal action"); Opinion 93-IO06 (Mar. 5, 1993) (agenda failed to state intent to convene and purpose of executive session)

In Opinion No 95-IB35 (Nov. 2, 1995), this Office determined that "FOIA does not limit the ability to make changes to the agenda to cases where the agenda specifically states that it is subject to change." Id. A public body has discretion to determine the agenda for any public meeting, and to make corrections or deletions, if necessary, at the next regularly scheduled meeting when the minutes are adopted. See Opinion 94-IO23 (June 21, 1994). But every public body should "honor good faith requests regarding matters of 'public concern' to be placed on the agenda." Id.

In Opinion 96-IB15 (May 10, 1996), this Office determined that the public body violated the notice provisions of FOIA, by stating that a public meeting was to convene at 1:30 p.m., when in fact the

meeting did not convene for two hours later.

(3) All public bodies shall give public notice of the type set forth in paragraph (2) of this subsection of any special or rescheduled meeting as soon as reasonably possible, but in any event no later than 24 hours before such meeting. A special or rescheduled meeting shall be defined as one to be held less than 7 days after the scheduling decision is made. The public notice of a special or rescheduled meeting shall include an explanation as to why the notice required by paragraph (1) of this subsection could not be given.

In Opinion 94-IO37 (July 26, 1994), this Office determined that notice of a special meeting posted 24 hours before the meeting failed to explain why normal 7-day notice could not be given. FOIA, however, "requires only a reason, not a specific detailed factual basis, why the seven-day requirement could not be met." Opinion 96-IB15 (May 10, 1996) (finding that the notice lacked "any explanation" why the seven-day requirement was not met).

(4) Public notice required by this subsection shall include, but not be limited to, conspicuous posting of said notice at the principal office of the public body holding the meeting, or if no such office exists at the place where meetings of the public body are regularly held, and making a reasonable number of such notices available.

In CIC, the Chancery Court held that posting a notice outside the DNREC office in Dover satisfied the FOIA requirement for notice to be posted at the principal office of the public body holding the meeting. Compare Opinion 96-IB05 (Feb. 13, 1996) (failure to post notice either at principal office or where public meetings regularly took place).

FOIA "encourages public presence at public business, and it is the function of a public body to ensure that the members of the public body do nothing to discourage the participation of the public." Opinion 96-IB23 (June 20, 1996). In Opinion 96-IB26 (July 25, 1996), this Office determined that the

county did not satisfy the notice provisions of FOIA, when it gave notice of a meeting in the county administrator's report. The purpose of requiring conspicuous posting of notice at the public body's principal office "is to ensure that no member of the public will have to search out and discover public meetings."

In Opinion 96-IB15 (May 10, 1996), this Office determined that the town council failed to satisfy the notice requirements of FOIA through the "regular practice" of announcing "the date of the next regular meeting at every regular meeting." Id. Such a practice "conflicts with the Act and is a direct contradiction of the statutory time frame for posting public notices of a public body." Id.

(5) When the agenda is not available as of the time of the initial posting of the public notice it shall be added to the notice at least 6 hours in advance of said meeting, and the reasons for the delay in posting shall be briefly set forth in the agenda.

In Opinion 96-IB15 (May 10, 1996), this Office determined that, although the agenda was posted six hours prior to the meeting, the termination issue listed in the agenda "had already been voted upon" at the previous regular meeting of the town council. Moreover, there were no reasons for the delay in posting set forth in the agenda.

(f) Each public body shall maintain minutes of all meetings, including executive sessions, conducted pursuant to this section, and shall make such minutes available for public inspection and copying as a public record. Such minutes shall include a record of those members present and a record, by individual members (except where the public body is a town assembly where all citizens are entitled to vote), of each vote taken and action agreed upon. Such minutes or portions thereof, and any public records pertaining to executive sessions conducted pursuant to this section, may be withheld from public disclosure so long as public disclosure would defeat the lawful purpose for the executive session, but not longer.

The statutory duty to maintain minutes of all public meetings does not require a public body to tape-record a public meeting. See Opinion 94-IO23 (June 21, 1994) (contrasting Section 10004(f) with the requirement of 29 Del. C. § 10125(d) that administrative hearings be tape-recorded).

This Office has pointed out that the minutes of executive sessions serve as the only "means by which this office may determine whether that legal advice was covered within the parameters of this exception to the Act." Opinion 93-IO06 (Mar. 5, 1993). At the very least, the minutes of an executive session must contain: the names of the members present, the topics discussed, and the vote to move out of executive session by a majority vote of a quorum. See Opinion 93-IO11 (May 6, 1993). See also Opinion 96-IB15 (May 10, 1996) (violation of FOIA for failure to prepare minutes of executive session).

Even where the public body has taped the executive session, FOIA still requires that minutes be prepared so that they are available for public inspection. See Opinion 96-IB25 (July 22, 1996).

In Red Clay, Common Cause argued that FOIA requires a public body to maintain detailed minutes of all matters discussed in executive session in order to monitor and enforce compliance with the statutory limits on executive sessions. Vice Chancellor Balick agreed that "[t]here is a practical reason to keep meaningful minutes. To the extent that a public body does not keep a contemporaneous record of the subjects discussed at an executive session but rather relies on the memory of those in attendance, the public body runs the risk of failing to meet its burden of proving that its action was justified when the propriety of an executive session is challenged." 1995 WL 733401, at p. 4. FOIA, however, "simply requires public bodies to disclose the purpose of executive sessions in the agenda"; it does not require "that the subjects discussed must be summarized nor attempts to define how specific such a summary should be." Id.

(g) Every regularly scheduled meeting of a public body shall be held within the geographic jurisdiction of that public body. All such other meetings shall be held as follows:

> **(1) A public body serving any political subdivision of the State, including, but not limited to, any city, town or school district, shall hold all such other meetings within its jurisdiction or the county in which its principal office is located;**
>
> **(2) For the purposes of this subsection, a "regularly scheduled meeting" shall mean any meeting of a public body held on a periodic basis.**
>
> **(3) The provisions of this subsection, insofar as they are not practicable, shall not apply to any emergency meeting which is necessary for the immediate preservation of the public peace, health or safety, or to a meeting held by a public body outside of its jurisdiction which is necessary for the immediate preservation of the public financial welfare.**

In 1988, the General Assembly amended Section 10004 of FOIA to add a new subsection (g). The "specific purpose" of that amendment was "to prevent local school boards from circumventing [FOIA] by holding meetings in locations that are inconvenient for their constituents." Opinion 89-IO14 (June 27, 1989) (citing, by way of example, school board "workshops" conducted in Pennsylvania).[13]

The question in Opinion 89-IO14 was whether local school board members could attend a state school board meeting in another county. "In theory, it could be argued that the presence of enough local board members at state school board meetings might turn those meetings into meetings of not only the state board but also prohibited meetings of the local boards as well." But "[c]alling a meeting of the state school

[13]In Executive Order No. 59 Governor Castle prohibited state boards and commissions subject to the Governor's jurisdiction from holding dinner meetings because it was impractical for the public to attend.

board or even a statewide meeting of the Delaware School Boards Association . . . . does not make such a statewide meeting a local one . . . The purpose of the gathering, the nature of the discussions and the action, if any, taken at the gathering will determine if it is a meeting for purposes of the prohibition on out-of-district meetings. Any doubt about the issue must be resolved in favor of the convenience of the public and not the government."

(h) This section shall not apply to the proceedings of:

(1) Grand juries;
(2) Petit juries;
(3) Special juries;
(4) The deliberations of any court;
(5) The Board of Pardons and Parole; and
(6) Public bodies having only 1 member.

The courts in other states have held that individuals do not constitute a "public body" for purposes of the open meeting laws. For example, in Ristau v. Casey, Pa. Cmwlth., 647 A.2d 642 (1994), the Governor of Pennsylvania nominated a judge for state court, who was confirmed by the Senate. A contender for the same judicial seat sued, claiming that the nomination process required meetings open to the public. The Commonwealth Court held that the Governor was not a public "body" for purposes of FOIA. "[A] body is defined as 'a group of individuals united by a common tie or organized for some purpose.' The term, therefore, connotes plurality. The Governor, on the other hand, is an individual in whom the Pennsylvania Constitution vests supreme executive power." 647 A.2d at 646 (quoting Webster's Third New International Dictionary 246 (1986)). See also Quinn v. Stone, Ill. App., 570 N.E.2d 676 (1991) (city alderman was not a "public body" for purposes of Illinois Freedom of Information Act). See also discussion supra at pp. 63-65.

(i) Forfeiture of Compensation

In 1997, the General Assembly enacted House Bill 244, which adds a new subsection (i). It provides that in any enforcement action under Section 10005 "a citizen or the Attorney General, as the case may be, may seek forfeiture of all or part of the compensation of members of a board, commission, or other public body for any closed meeting which such board, commission, or other public body closed knowing that such action violated this chapter."

SECTION 10005. ENFORCEMENT

(a) Any action taken at a meeting in violation of this chapter may be voidable by the Court of Chancery. Any citizen may challenge the validity under this chapter of any action of a public body by filing suit within 60 days of the citizen's learning of such action but in no event later than 6 months after the date of the action.

Section 10005 does not vest exclusive jurisdiction in the Chancery Court "to void an action taken in violation of the FOIA." Beebe, 1995 WL 465318, at p. 4 (citing East Coast Resorts, Inc. v. Board of Adjustment of Town of Bethany Beach, Del. Super., 1993 WL 258707 (June 17, 1993) (Lee, J.)). The Superior Court can assert jurisdiction over a FOIA violation in the context of an appeal from an administrative ruling "in the interest of judicial economy." Beebe, at p. 4. It is "within the Superior Court's power to reverse [an agency for violating FOIA] and to remand for a rehearing if the situation warrants such a remedy." Id. See also Nicholson v. Industrial Accident Board, Del. Ch., C.A. No. 1353-K (June 16, 1997) (Chandler, V.C.) (on appeal from a decision by the IAB, "the Superior Court can also consider a procedural claim that the Board violated FOIA provisions").

In Red Clay, plaintiffs challenged a series of executive sessions by the school board to discuss its open enrollment plan, as violating the open meeting law**.** To the extent the complaint was based on deficient minutes published more than sixty days before filing suit, "it follows that those allegations are barred." Where plaintiffs did not learn that the school board went beyond the lawful scope of executive session until much later, their complaint was subject to the longer, six-month statute of limitations.

In Wilmington Federation of Teachers v. Howell, Del. Supr., 374 A.2d 832 (1977), a teacher's union challenged an anti-strike injunction issued by the Chancery Court, arguing that since the school board

had violated the open meeting law, its decision to seek an injunction was void and therefore the Chancery Court lacked jurisdiction. The Supreme Court disagreed. Unlike the open meeting laws in other states, Delaware's FOIA did not provide that actions taken in violation of FOIA were "null and void." Indeed, "invalidation of a public body's decisions is a very serious sanction. . . . ‹The strongest objection to using invalidation as a sanction is that its salutary effect does not seem worth the heavy costs. Both citizens and officials rely on governmental decisions in planning their everyday affairs, and to allow subsequent invalidation of such decisions simply because they were in violation of ambiguously drawn open meeting laws would create a substantial amount of undesirable uncertainty.'" 374 A.2d at 835-36 (quoting Comment, Open Meeting Statutes: The Press Fights for the ‹Right To Know', 75 Harv. L. Rev. 1199, 1213-14 (1962)).

In Ianni, Chancellor Allen noted that, since the Supreme Court's decision in Howell, the General Assembly had amended Section 10005 of FOIA to provide that "any action taken at a meeting in violation of this chapter may be voidable" and to authorize the remedy of an "injunction." See 65 Del. Laws c. 191, s.13. Still, the Supreme Court had cautioned that the remedy of invalidation "is a serious sanction and ought not to be employed unless substantial public rights have been affected and the circumstances permit the crafting of a specific remedy that protects other legitimate public interests." Ianni, 1986 WL 9610, at p. 7. "Not every failure to comply with precision to the terms of [FOIA] will involve substantial public rights and thus not every technical violation will support either a declaratory judgment or, more importantly, injunctive relief." Id. The Chancellor concluded that the failure to give adequate notice of a public meeting to decide to reduce the number of polling stations deprived "members of the public with an intense interest in the subject of the Board's action" of notice "that such subject would be addressed. The violations were

several and, in all the circumstances, I conclude, affected substantial public rights and interests." Id.

In Levy, parents sought to enjoin the implementation of a school reassignment plan, because the school board had voted on the plan in violation of the open meeting laws. The school board argued that a later vote satisfying the open meeting requirements validated the earlier violations of FOIA under the harmless error doctrine. "There may be circumstances where this Court would legitimately conclude that a later public vote at a meeting held in compliance with the sunshine law would remedy an earlier minor violation." 1990 WL 154147, at p. 7. But the court would not do so given the record of "a pattern of violations." Id. Moreover, the court was convinced that the second vote was nothing more than "the pro forma acceptance of an informal decision reached during earlier private meetings." Id.

As for the sanction, the Chancery Court decided not to undo the school reassignment plan**,** which had already been fully implemented. An injunction would disrupt teaching assignments and classes, as well as curriculum plans and lessons. The court, however, enjoined the school board from holding any executive session to discuss reorganization and redistricting issues affecting the Cape Henlopen School District.

In CIC, Vice Chancellor Jacobs concluded that voiding the regulations at issue was "the only appropriate remedy." 1994 WL 274295, at p. 14. Although invalidation was a sanction not "to be undertaken lightly," the court found that "material violations of both the letter and spirit of FOIA have occurred that adversely affect substantial public rights, and no 'other legitimate public interests' are implicated for which a protective specific remedy need by crafted." Id. (quoting Ianni). The court noted that the State Coastal Zone Industrial Control Board "has been unable to suggest any appropriate lesser remedy. Moreover, to void the Regulations as invalidly adopted will not visit adverse consequences upon innocent parties, because the Regulations have never been, nor are they presently being, enforced. The

Board has not demonstrated that the public would be harmed if the status quo were allowed to continue for a brief period pending a remedial rule-making process in compliance with FOIA." Id.

In contrast, in Beebe the Superior Court declined to void the action taken following an unlawful executive session. "This is not a case where the Council's action was entirely taken in executive session. Rather, this is a case where there was ample input from the applicants and the public; where there was a full public discussion; and where any violation of the FOIA was de minimis when taken in context with the entire process." 1995 WL 465318, at p. 6. Furthermore, "the Council's action is advisory. In view of the lengthy fact finding, review and hearing process which has occurred in this case, I do not feel that a violation of the FOIA, if it occurred, harmed Beebe Hospital or the general public and therefore I decline to invalidate the action of the Council." Id.

(b) Any citizen denied access to public records as provided in this chapter may bring suit within 60 days of such denial. Venue in such cases where access to public records is denied shall be placed in a court of competent jurisdiction for the county or city in which the public body ordinarily meets or in which the plaintiff resides.

The General Assembly has extended the time period for filing suit from ten to sixty days. See 65 Del. Laws c. 191 s. 13(b). Even when an action is untimely filed, the Supreme Court has held that the complaint may nevertheless be heard when "the plaintiffs [prison inmates] are not represented by counsel." Jenkins, 449 A.2d at 207.

(c) In any action brought under this section, the burden of proof shall be on the custodian of records to justify the denial of access to records, and shall be on the public body to justify a decision to meet in executive session or any failure to comply with this chapter.

In Guy, the Superior Court emphasized the heavy burden of proof on a public body to justify withholding records. The statutory "allocation of the burden of proof underscores the basic public policy that disclosure, not secrecy, is the purpose behind the Act, . . . and also recognizes that the plaintiff asserting a freedom of information claim has a disadvantage because only the public body holding the information can speak confidently regarding the nature of the material and the circumstances of its preparation and use which might support an exemption defense." 659 A.2d at 781. In Guy, the State claimed that the documents requested fell within the personnel exemption to FOIA, but failed to submit any affidavits "sufficient to show that it is factually impossible for the plaintiff to defeat that defense." Id.

(d) Remedies permitted by this section include an injunction, a declaratory judgment, writ of mandamus and/or other appropriate relief. The court may award attorney fees and costs to a successful plaintiff of any action brought under this section. The court may award attorney fees and costs to a successful defendant, but only if the court finds that the action was frivolous or was brought solely for the purpose of harassment.

In Briscoe v. Gulledge, Del. Ch., 1981 WL 15137 (Apr. 3, 1981) (Marvel, C.), inmates at the Delaware Correctional Center sought to compel disclosure of their prison records. The Chancery Court dismissed the suit for lack of equity jurisdiction. "I am satisfied that plaintiffs have an adequate remedy at law in the form of mandamus and that their complaint, which in form seeks a mandatory injunctive order, actually seeks the performance of an alleged ministerial duty, for which a writ of mandamus in Superior Court is an adequate remedy, 10 Del. C. Section 342." Accord Rapposelli v. Elder, Del. Ch., 1977 WL 23821 (Nov. 8, 1977) (Marvel, C.); Jenkins, supra (where plaintiff seeks to compel production of public records, the proper avenue is for a writ of mandamus in Superior Court).

In Layfield v. Hastings, Del. Ch., 1995 WL 419966 (July 10, 1995) (Allen, C.), the town argued

that it should not be assessed with attorney's fees since, after the FOIA complaint was filed, it backed down and produced the public records the plaintiffs had requested. Chancellor Allen, however, awarded fees against town officials. "The purpose of the FOIA might be significantly frustrated were citizens compelled to file suit in order to obtain what the General Assembly has decreed they are entitled, only to have the governmental agency then accede to the request but oppose an award of necessary costs. It can be inferred that at least some citizens with legitimate claims under FOIA would be deterred from pursuing them if they were required to pay the costs of a meritorious action, with no hope of recovering such costs in the event that the case is dismissed because of late compliance." 1995 WL 419966, at p. 3.

In CIC, the Chancery Court declined to award attorney's fees "as a matter of discretion." 1994 WL 274295, at p. 15. The plaintiffs argued that fees were appropriate to "encourage the Board and other public bodies to take seriously their responsibilities under FOIA. I cannot agree. The plaintiffs have not established that the Board acted in bad faith by withholding the public records . . . Its decision to do that had a colorable -- albeit erroneous -- legal basis. Moreover, because the plaintiffs have a significant private economic interest in invalidating the Regulations, no fee shifting was (or would be) needed to afford them an incentive to bring suit." Id.

(e) Any citizen may petition the Attorney General to determine whether a violation of this chapter has occurred or is about to occur. The petition shall set forth briefly the nature of the alleged violation. Upon receiving a petition, the Attorney General shall, within 10 days, notify in writing the custodian of records or public body involved. Within 20 days of receiving the petition, the Attorney General shall make a written determination of whether a violation has occurred or is about to occur, and shall provide the citizen and any custodian of records or public body involved with a copy of the determination. If the Attorney General finds that a violation of this chapter has occurred or is about to occur, the citizen may: (1) File suit as set forth in this chapter; or (2) request in writing that the Attorney General file suit on the citizen's behalf. If such a request is made, the Attorney General may file suit, and shall within 15 days notify the citizen of the decision to file suit, unless the custodian of records or public body has agreed to

comply with this chapter. The citizen shall have the absolute right to file suit regardless of the determination of the Attorney General, and may move to intervene as a party in any suit filed by the Attorney General.

When a citizen has already filed suit in court alleging a violation of FOIA, this Office will not issue a written determination under Section 10005. "Since this matter now rests within the jurisdiction of the Superior Court, the request for a determination by the Attorney General of whether a violation of 29 Del. C. Section 10005(e) has or is about to occur is now moot. No further enforcement action is required by this office." Opinion 95-IB25 (Aug. 15, 1995).

This Office has concluded that it is not bound by the 60-day statute of limitations in Section 10005 when it comes to the exercise of the Attorney General's unique statutory role in the investigation of FOIA complaints. See Opinion 95-IB15 (May 10, 1996). This is appropriate, both because of the time it takes to investigate and hear from both sides of the controversy, and because the FOIA violations are often multiple and of a continuing nature.

This Office, however, has declined to make a written determination where the matters complained of took place more than six months before the complaint was received. See Opinion 93-IO06 (Mar. 5, 1993) (allegations related to a town council meeting three years earlier "are too remote in time and this office will not consider them"); Opinion 94-IO16 (Apr. 7, 1994). This policy decision was made by analogy to the statute of limitations in Section 10005(a) for suing in Chancery Court. See Opinion 93-IO28 (Sept. 21, 1993) ("Using [Section 10005(a)] as guidance, the complainant raised an allegation of a violation that occurred over two years ago. Therefore this allegation is too remote in time and its substance will not be addressed in this opinion.").

Unlike the Chancery Court, this Office has no authority to "void" any action by a public body taken

in violation of FOIA. In a number of cases, however, this Office has directed the public to take remedial action, in an effort to try to resolve the matter without having to resort to the courts. Under Section 10005(d), "it is the Attorney General who is charged under the statute with the responsibility to investigate and respond to petitions alleging FOIA violations. Further, the Attorney General is given standing to sue in Chancery Court for FOIA violations. Having found a FOIA violation, it would be an abdication of the Attorney General's unique role in this process not to express some opinion on the need for and type of remedial action, if any, to resolve the complaint. In most cases, the public body takes the recommended remedial action, and expensive and wasteful litigation is avoided." Opinion 96-IB25 (July 22, 1996).

(f) Subsection (e) of this section shall not apply to an alleged violation by an administrative office or officer, agency, department, board, commission or instrumentality of state government which the Attorney General is obliged to represent pursuant to Section 2504 of this title.

This subsection avoids a potential conflict when a FOIA complaint is lodged against a State agency or official which this Office has a statutory duty to represent.

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